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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Case Nos. 08-13555 (JMP) ; 08-01420 (JMP) (SIPA)
- - - - -x
In the Matter of:

LEHMAN BROTHERS HOLDINGS INC., et al.
Debtors.
- - - - -x
In the Matter of:

LEHMAN BROTHERS INC.
Debtor.
- - - - -x
United States Bankruptcy Court
One Bowling Green
New York, New York

August 24, 2010
9:34 AM

B E F O R E:
HON. JAMES M. PECK
U.S. BANKRUPTCY JUDGE

1
2 CONTINUED EVIDENTIARY HEARING re (i) Motion of Debtor to Modify
3 the September 20, 2008 Sale Order and Granting Other Relief;
4 (ii) Motion of the Trustee for Relief Pursuant to the Sale
5 Orders or, Alternatively, for Certain Limited Relief Under Rule
6 60(b); (iii) the Motion of Official Committee of Unsecured
7 Creditors of Lehman Brothers Holdings Inc., Authorizing and
8 Approving (A) Sale of Purchased Assets Free and Clear of Liens
9 and Other Interests and (B) Assumption and Assignment of
10 Executory Contracts and Unexpired Leases, Dated September 20,
11 2008 (and Related SIPA Sale Order) and Joinder in Debtors' and
12 SIPA Trustee's Motions for an Order Under Rule 60(b) to Modify
13 Sale Order; (iv) All Joinders Thereto and Related Adversary
14 Proceedings; and (v) Motion of Barclays Capital Inc. to Enforce
15 the Sale Order and Secure Delivery of All Undelivered Assets
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25 Transcribed by: Lisa Bar-Leib

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1 P R O C E E D I N G S

2 THE COURT: Be seated, please. Good morning.

3 MR. BOIES: Good morning, Your Honor. Your Honor, we
4 have one housekeeping matter at the beginning. We've conferred
5 about an issue with respect to the admissibility of certain
6 data called GFS data. There is going to be a witness presented
7 by deposition by the name of Uma Krishnan who will address
8 that. What we have agreed is that since there will be an
9 objection to that GFS data that we will resolve that by one of
10 two ways. Either we will make Uma Krishnan available in court
11 live for voir dire at the time that that GFS data is offered.
12 Or, we will, in advance of offering that GFS data, allow
13 sufficient time for both sides to present letter briefs on
14 admissibility to the Court so that the Court will have an
15 opportunity before the issue is presented to have the letter
16 briefs for consideration.

17 THE COURT: I understood everything that you said
18 except that I don't know what GFS data is nor do I understand
19 in what respect the GFS data connects to any issue in the case.

20 MR. BOIES: We understand that, Your Honor. And we
21 will present that at the time that it's offered although I will
22 say that, very generally, and I'm probably -- neither one of us
23 is probably the right person to actually get into the details
24 of GFS data. But it relates to valuation. It was a system
25 that contain valuation for securities at Lehman. And the

1 question is going to be whether the GFS data is or is not data
2 that is relevant to determining what Lehman's marks were on
3 September 12, September 15th, 16th and the like and whether it
4 is something that can be reliably considered by the Court or
5 not.

6 THE COURT: And the witness whose deposition might be
7 offered or whose live testimony might be offered has what
8 connection to this data?

9 MR. BOIES: She is somebody who is responsible and
10 knowledgeable, one or the other or both, with respect to the
11 data. And she will describe that in the deposition. And we
12 can provide further details to the Court at the time. My point
13 today is not to try to explain all of this to the Court but
14 simply to advise the Court and record the agreement that
15 counsel has made as to how we're going to treat this issue.

16 THE COURT: Okay. And when is expected that this
17 issue will be ripe for presentation?

18 MR. BOIES: I believe -- Your Honor, could I just get
19 my schedule for one second?

20 THE COURT: Sure.

21 MR. BOIES: I believe it's around September --

22 (Pause)

23 MR. BOIES: September 7th, Your Honor. Possibly
24 September 10th. Probably September 7th.

25 THE COURT: Okay. I'll look forward to that.

1 MR. BOIES: Thank you very much, Your Honor.

2 MR. HINE: Good morning, Your Honor. My name is
3 William Hine from Jones Day on behalf of LBHI for the record.
4 And I'm prepared, if it please the Court, to continue with my
5 cross-examination of Mr. Exall from yesterday.

6 THE COURT: Fine.

7 MR. HINE: Your Honor, I placed on your bench and in
8 front of the witness a green binder of documents that I plan on
9 using in my cross-examination if that's okay.

10 THE COURT: Okay.

11 MR. HINE: May I proceed?

12 THE COURT: Please. And please speak up.

13 MR. HINE: Okay, Your Honor.

14 CROSS-EXAMINATION

15 BY MR. HINE:

16 Q. Good morning, Mr. Exall.

17 A. Good morning.

18 Q. My name is Bill Hine from Jones Day. We've met previously
19 at your deposition, if you recall.

20 A. I do.

21 Q. I want to take you back to the testimony you gave
22 yesterday about a chart that you prepared concerning payments
23 that Barclays has made of various kinds to former Lehman
24 employees who have moved to Barclays. Do you recall that
25 testimony?

1 A. I recall it, yes.

2 Q. And if I could just show a copy of M107 just to make sure
3 we're all talking about the same chart. Yesterday, you
4 testified about a chart which was marked as BCI 142A which had
5 some red coloring. In your book is a copy of M107. Could you
6 please just verify that we're talking about the same chart?

7 A. Could you refer me to the copy in the binder, please,
8 that's -- I can't see it on the screen properly.

9 Q. Okay. It's in your binder, M107.

10 A. M1 -- okay. Sorry. Sorry. Is it the big binder or the
11 little binder?

12 Q. Yes, the big binder. It should be marked as M107.

13 A. Oh. Oh yes. I see it. Yes, I recognize the schedule.

14 Q. And that schedule comes to a number of 1.951 billion in
15 total spent just like the schedule you talked about yesterday,
16 correct?

17 A. That's correct.

18 Q. Okay. And as I understood your testimony yesterday,
19 Barclays' position is that this chart demonstrates that it is
20 complied with all its obligations with respect to paying former
21 Lehman employees under the APA, is that right?

22 MR. BOIES: Objection, Your Honor. I don't think he
23 was speaking about Barclays' position in this litigation. He
24 was simply testifying as to what the chart was.

25 THE COURT: The objection is sustained as it relates

1 to a litigation position. We're going to limit our questions
2 to the chart.

3 MR. HINE: Okay, Your Honor. You can take the chart
4 down.

5 Q. Mr. Exall, you were designated as a 30(b)(6) witness in
6 this case with respect to bonus and severance payments made to
7 former Lehman employees who came over to Barclays, isn't that
8 right?

9 A. I believe that was the categorization of my witness in
10 relation to the schedule that was prepared.

11 Q. Okay. And let's just take a look at your deposition
12 notice -- or your 30(b)(6) notice that relates to you.

13 MR. HINE: Could you please put up M766?

14 Q. And that's in your binder as well, Mr. Exall. M766.

15 A. 766. Bear with me. Okay.

16 Q. You recognize this document, Mr. Exall?

17 (Pause)

18 A. I may have seen it.

19 Q. Okay. You saw this before your deposition, correct?

20 A. I don't specifically recall it but --

21 Q. Okay. Any reason to doubt that this is the deposition --
22 30(b)(6) deposition notice to which Barclays was responding
23 when they designated you as their witness on bonus and
24 severance payments?

25 A. I have no reason to doubt it, no.

1 Q. Okay. And you generally reviewed this document before
2 your deposition, right?

3 A. I don't specifically recall it but I probably did, yes.

4 Q. Okay. Well, you understood you were being deposed as a
5 30(b)(6) witness, correct?

6 A. Yeah. I recall the phrase and I recall discussion around
7 what that meant, yes.

8 Q. Okay. And just for clarity sake, could you please turn to
9 Schedule A of this document?

10 A. Okay.

11 Q. And you recognize that as the topics on which you were
12 designated as a 30(b)(6) witness, correct?

13 A. It makes sense to me.

14 Q. Excuse me?

15 A. It does make sense to me, yes.

16 Q. Okay.

17 MR. HINE: Your Honor, we'd move this document into
18 evidence.

19 MR. BOIES: No objection, Your Honor.

20 THE COURT: Fine. It's admitted.

21 (Movants' Exhibit 107, deposition notice designating Paul Exall
22 as Barclays' 30(b)(6) witness on bonus and severance payments,
23 was hereby received into evidence as of this date.)

24 Q. Just for a point of clarity, Mr. Exall, you'll see on
25 Schedule A there's a Bates number, what we call a Bates number

1 referring to a particular spreadsheet. Do you see that?

2 A. Could you highlight it for me, please?

3 Q. About the third line down, it talks about a spreadsheet
4 produced by Barclays and numbered BCI --

5 A. Yes.

6 Q. -- EX000077287. Do you see that?

7 A. I see that.

8 Q. And now that is not the same Bates number on the M107 that
9 we just looked at.

10 A. Okay.

11 Q. Correct?

12 A. If you say so.

13 Q. Okay. Well, let's look at M107 again. You'll see the
14 number in the lower right-hand corner. It's a different
15 number.

16 A. Yes.

17 Q. You might want to keep your finger on the M107 tab --

18 A. Okay.

19 Q. -- 'cause we'll be going back to it. I just want to
20 clarify that apparent discrepancy. The reason the numbers are
21 different is because M107 is an updated version of an earlier
22 spreadsheet that you sent -- prepared in connection with this
23 case, right?

24 A. That's correct.

25 Q. And so, the earlier version was sent to the movants and

1 that was what is referenced in the 30(b)(6) notice, right?

2 A. I recall that there were two schedules. And this one here
3 is the updated one, yes.

4 Q. Okay. So M107 is the updated version, correct?

5 A. Yes.

6 Q. And that's the version about which you testified at your
7 deposition, correct?

8 A. That's correct. I recall the other one was -- we
9 discussed that at the deposition, yeah.

10 Q. It was superseded and M107 replaced the one that was
11 referred to --

12 A. Yes.

13 Q. -- in the deposition notice, is that right?

14 A. Yes. That's accurate.

15 Q. Okay.

16 MR. HINE: You can take that down, please.

17 Q. Now, Mr. Exall, understanding that you were designated for
18 certain topics as a 30(b)(6) witness, I just want to go over a
19 little bit of your background. You had no role whatsoever in
20 the negotiations surrounding the sale transaction between
21 Lehman and Barclays, is that right?

22 A. I did not have any role, no.

23 Q. Right. Okay. So you had no role in negotiating the
24 compensation provisions that are embodied in the asset purchase
25 agreement, correct?

1 A. No.

2 Q. Okay. You had no role in disclosures that were made to
3 the Court about compensation issues, is that right?

4 A. No. I was not involved.

5 Q. Okay. And you weren't at any of the sale hearings -- the
6 hearing on September 19th, correct?

7 A. No. I was not there.

8 Q. In fact, you weren't even in New York then, right?

9 A. That's my recollection. I was I London, yes.

10 Q. You came to New York sometime around the 21st or 22nd of
11 September, is that right?

12 A. I believe I landed Sunday -- Sunday evening, yes.

13 Q. Okay.

14 A. The 21st.

15 Q. So even after you came to New York, you didn't review
16 copies of the clarification letter that relates to the
17 Lehman/Barclays transaction, correct?

18 A. That's correct.

19 Q. Okay. So it's safe to say you have no first-hand
20 knowledge about what exactly took place and the negotiations
21 between the parties to the sale transaction right?

22 A. I have no first-hand knowledge of the events at the time,
23 yeah.

24 Q. Right. And so if you wanted to learn what had happened in
25 those negotiations, you would have to confer with someone who

1 was actually involved, right?

2 A. That would be correct.

3 Q. Okay. And you would necessarily defer to someone who was
4 involved in the negotiations if you had to develop an
5 understanding of the intent of the parties and what took place
6 in those negotiations. Isn't that fair to say?

7 A. It's fair to say. If I had a question of events at the
8 time, I would have discussed those, if relevant, with people
9 involved, yes.

10 Q. Right. Right. Now when you did come over to New York in
11 late September of 2008, you were asked to undertake a role in
12 tracking, monitoring and modeling how much money Barclays was
13 paying to former Lehman employees who came over to Barclays,
14 right?

15 A. Yes. That was my functions, yes.

16 Q. Okay. That's one of the reasons you were asked to come
17 over here, correct?

18 A. That was one of the reasons, yes.

19 Q. Okay. And on or about September 22nd was the first time
20 you were handed a copy of the asset purchase agreement,
21 correct?

22 A. I believe so, yes.

23 Q. Okay. And Mr. Romaine gave you a copy of that agreement?

24 A. He sent me a copy of -- and I don't -- I'm not certain
25 whether it was the final version, but he sent me a copy

1 thereof, yes.

2 Q. He thought you would need that in connection with this
3 function you were going to perform for Barclays, right?

4 A. That's correct.

5 Q. Okay. And you were also given a copy of the September
6 16th financial schedule that's referred to in the APA?

7 A. I was given the schedule which when I asked -- sorry. Let
8 me start that again. I asked for the schedule referred to in
9 Article 9 of the draft that I had seen.

10 Q. Okay.

11 A. And I was given a schedule that was purported to be that
12 schedule referred to.

13 Q. Okay. So you read the asset purchase agreement and you
14 saw in Article 9 a reference to a schedule and you asked for a
15 copy?

16 A. That's correct.

17 Q. Okay. And Mr. Clackson (ph.) gave you a copy of that
18 schedule?

19 A. I believe it was Mr. Clackson, yes.

20 Q. And Mr. Clackson represented to you that that was the
21 schedule referred to in Section 9.1(c) of the APA, isn't that
22 right?

23 A. I don't recall exactly what he said to me about it, but I
24 had asked for a copy of that schedule and that's what I
25 received.

1 Q. But in fact -- well -- it was represented to you -- isn't
2 it correct that that was the schedule that was referred to in
3 Section 9.1(c) of the APA, right?

4 A. As I said, I requested a copy of the schedule referred to
5 in Article 9 and that's what I received from finance.

6 Q. Okay. Mr. Exall, could you turn to -- in your binder is a
7 copy of the transcript from your deposition.

8 A. Sure.

9 Q. And I refer you to page 38.

10 A. Sorry. Where --

11 Q. Page 38. Should be a tab marked "Deposition".

12 A. Page 38?

13 Q. Page 38. And you'll see a series of questions starting
14 on -- let's go to line 2. You'll see -- well, I'm sorry. I
15 have to go to the prior page. I apologize. Page 37 on line
16 22. Excuse me.

17 A. Yes.

18 Q. And you'll see we're talking about the schedule and I ask:
19 "Okay. Who gave you that schedule?"

20 "A. Mr. Clackson passed me the schedule."

21 Now if we continue on to the next page:

22 "Q. What did he tell you about it?"

23 "A. He represented this as being the schedule referred to in
24 the APA."

25 Now that's the testimony that you gave under oath at your

1 deposition, is that right?

2 A. Yes.

3 Q. Okay. And that was true testimony when you gave it?

4 A. Yes. That's my testimony.

5 Q. Okay.

6 A. I would add that further on, it states that I don't recall
7 what he told me about it.

8 Q. I understand.

9 MR. HINE: Now can we put up Exhibit M-2, Steve?

10 Q. If you turn in your binder to Exhibit M2, Mr. --

11 A. M2?

12 Q. M2, yes.

13 A. Okay.

14 Q. And can you confirm that that is, in fact, the copy of the
15 schedule that Mr. Clackson gave you?

16 A. I believe that's the schedule that was passed to me, yes.

17 Q. Okay. And in performing this function, you were -- in
18 tracking payments to former Lehman employees, you operated
19 under the assumption that that was the schedule referred to in
20 Section 9.1(c) of the APA, right?

21 A. No. I didn't have a real view as to what the schedule was
22 that related to Article 9. It was unclear to me in that the
23 draft of the APA that I was reading referred to a schedule that
24 had been initialed by two parties. This has only been
25 initialed by one. The -- Article 9 also referred to bonus on

1 several occasions. This schedule doesn't have the word bonus
2 on it. I was unclear as to what the schedule actually
3 represented. And in fact, it was not necessary for me to
4 understand that for the purposes of my role.

5 Q. I understand that's your position. But my question is
6 were you given any other schedules?

7 A. In relation to the APA?

8 Q. In relation to your work in tracking payments to Barclays'
9 employees -- or Lehman employees --

10 A. I received --

11 Q. -- under the APA.

12 A. On a day to day basis, I received many schedules on many
13 topics.

14 Q. Were you given any schedules that were represented to you
15 as that -- as referred to in Section 9.1(c) of the APA?

16 A. No. This is the only schedule that was passed to me.

17 Q. Okay. Now let's look over a copy of the APA, please,
18 which is M1. Now this is the copy of the APA that you were
19 given, Mr. Exall?

20 A. I don't recall if this is the specific copy --

21 Q. Okay.

22 A. -- but I received a draft version of it, as I said.

23 Q. Okay. In general, you reviewed this agreement generally.
24 But is it fair to say you focused on Section 9.1 of the APA?

25 A. It'll be fair to say I read Article 9 as you've described

1 and, for want of a better word, skimmed the rest.

2 Q. Fair enough. And the reason you read Article 9 is 'cause
3 that related to the work you were going to be doing in tracking
4 payments to former Lehman employees, right?

5 A. No. Mr. Romaine directed me to Article 9 to say this may
6 be something that you may be interested in.

7 Q. Okay. And so you -- Article 9 or the APA became kind of a
8 point of reference for you in tracking the payments to former
9 Lehman employees, right?

10 A. No, it did not.

11 Q. It did not? Can you turn in your deposition to page 17.4

12 --

13 A. 17?

14 Q. -- 17, please?

15 A. 17.

16 Q. 17 at the very bottom starting on line 25. I ask:

17 "Okay. And when were you passed that agreement?

18 "A. I can't recall the exact date but it would have been
19 around the 22nd of September or shortly thereafter.

20 "Q. Okay. And did you need to consult that agreement to do
21 your job from then on?

22 "A. It was a point of reference, yes."

23 That's the testimony you gave at your deposition, right?

24 A. Okay.

25 Q. So the APA was a point of reference for your future work,

1 right?

2 A. Apologies for the previous -- but yes. I read it. It
3 became part of my understanding. And it -- and from then on,
4 it did not play a major part in what I actually did.

5 Q. Right. But I -- and I understand you testified yesterday
6 that you didn't have a specific understanding of the exact
7 provisions of the APA as they relate to compensation, right?

8 A. No.

9 Q. No, you did not testify to that effect or --

10 A. No. I -- in reading Article 9 and referencing the
11 schedule that was passed to me, I had no clear understanding of
12 what Barclays' obligations may or may not have been under the
13 APA.

14 Q. You didn't have a legal understanding, right?

15 A. No legal --

16 Q. It's fair to say you had a general familiarity with
17 Article 9, correct?

18 A. I read the clause.

19 Q. Okay. So when you're doing your chart, you have to know,
20 for example, what's a bonus and what's a severance, right, in
21 order to prepare your chart, correct?

22 A. I do know what a bonus and what a severance is.

23 Q. Yeah, 'cause you have to know that. You have to know the
24 cutoff dates for bonuses and severance that are set forth in
25 Article 9 in order to determine whether to put those payments

1 on your chart, isn't that right?

2 A. No. Mr. Romaine and I had discussions over the time. And
3 I came to learn that the way Barclays were accounting for the
4 transaction -- and he requested that I track all compensation
5 payments made to former Lehman Brothers employees in relation
6 to their pre-acquisition services. And when I say
7 compensation, I mean all forms of compensation as I would
8 understand that.

9 Q. Okay. And you were tracking pre-acquisition services
10 because those are the ones that are discussed in Article 9 of
11 the APA, right?

12 A. No. I was tracking pre-acquisition services because Mr.
13 Romaine requested that I do so.

14 Q. So it's your testimony that you really have absolutely no
15 understanding of the provisions of Article 9 in connection with
16 doing the job that you did?

17 A. I felt that having read Article 9 and the clarity that I
18 did not take from it, I felt that it was not relevant to the
19 job that I was there to perform. And ultimately, it became a
20 point of interest rather than something that I referred to to
21 do my job.

22 Q. Okay. Let's take a look at Article 9 for a minute.

23 MR. HINE: Could you please put up Section 9.1(b),
24 Steve?

25 Q. That's Movants' -- M1.

1 A. M1, yeah.

2 Q. I believe it's on page 34. Now, Mr. Exall, when you
3 reviewed the APA or Article 9, you understood this provision to
4 be relating to the severance payments that would purport to be
5 made to former Lehman employees, correct?

6 A. I see the words "severance payments" in this clause.

7 Q. Okay. And this clause provides that in the event of a
8 reduction in force or a job elimination, right, the qualified
9 transferred employees would be entitled to some form of
10 severance no less favorable than what they would have received
11 under the Lehman plan, isn't that right?

12 A. I don't have a legal view as to what this clause means.

13 Q. Well, you did review it, right? That's what it says, is
14 that right?

15 A. It doesn't quite say what you said.

16 Q. Okay. It relates to severance, isn't that right, Mr.
17 Exall?

18 A. I see the words "severance payments" in the clause.

19 Q. And you nowhere see the phrase "bonus" in this
20 subparagraph, do you?

21 A. Sorry. Do I see the word "bonus" in this paragraph?

22 Q. Yeah. Do you see the word "bonus" in subparagraph (b)?

23 A. Excuse me. Let me just read the whole thing.

24 (Pause)

25 A. No. I do not see the word "bonus".

1 Q. Okay. Now let's turn to paragraph (c), subparagraph (c),
2 9.1(c), which is the next page.

3 A. Excuse me.

4 (Pause)

5 Q. And you'll agree with me that this paragraph relates to
6 the payment of annual bonuses, isn't that right?

7 A. The words "annual bonuses" are shown in this clause, Yes.

8 Q. Okay. And you understand based on your employment in the
9 human resources field that there's a difference between
10 severance and a bonus, right, in general?

11 A. Sorry. Can you repeat that question?

12 Q. Well, based on your experience in human resources, a
13 severance is a payment that's given to people who are laid off
14 or terminated so that they can transition to a new job, as a
15 general matter, isn't that true?

16 A. As a general matter, that would be true in the general
17 sense, although I would follow on to say that oftentimes when
18 negotiating settlements with individuals, their severance
19 arrangements will most likely take some consideration of what
20 their bonus had been in the prior year --

21 Q. Sure.

22 A. -- and provide some compensation for that.

23 Q. So that's the level of severance. But the actual -- what
24 a severance is, is basically a transition payment to help
25 people move on to a new job, is that right?

1 A. It feels like an acceptable definition. There is no
2 specific definition of severance --

3 Q. I understand.

4 A. -- other than what's embodied in each firm's practices,
5 yes.

6 Q. I understand. And can we go back to 9.1(b), the provision
7 on severances? I draw your attention to the opening phrase
8 which says "Without limiting any additional rights that each
9 transferred employee may have" and then it goes on to say that
10 the purchaser shall pay severance. Do you see that opening
11 phrase?

12 A. I see the phrase, yes.

13 Q. When you reviewed this document in September of 2008, you
14 understood that to mean that a severed employee would be able
15 to get a severance payment from Barclays but they could also
16 collect on any other additional rights or benefits that they
17 might be entitled to, isn't that right?

18 A. I don't particularly have a view as to what that means.

19 Q. You have no idea what that means?

20 A. I'm not a lawyer.

21 Q. Okay.

22 MR. HINE: Let's go back to 9.1(c), Steve.

23 Q. Now, in general, a bonus payment is -- again, based on
24 your experience as a employee in human resources for a number
25 of years, a bonus is typically a payment that's made on a

1 periodic basis to incentivize employees to bigger and better
2 things later, isn't that right?

3 A. I prefer to use the term personally "incentive
4 compensation".

5 Q. Okay.

6 A. It's compensation due and payable for services rendered
7 during a period of employment that is variable incentive in the
8 sense that -- you know, it's for -- if you do a good job, you
9 get paid; if you don't do your job --

10 Q. Sure.

11 A. -- you don't get paid.

12 Q. Sure. And, in fact, in the fourth line of this paragraph,
13 we see the phrase "incentive compensation", right?

14 A. I see that phrase.

15 Q. Okay. And it says so a bonus -- in the definition of
16 bonuses, it uses the phrase "incentive compensation but not
17 base salary". Do you see that?

18 A. I see that.

19 Q. And based on your view of the document in September 2008,
20 you understood that's what the bonuses were to entail,
21 correct --

22 A. As I --

23 Q. -- in some form?

24 A. As I said, I do not particularly have an understanding as
25 to what Barclays' obligations are under this APA at all.

1 Q. I understand. Okay. You will agree with me also, though,
2 that nowhere in paragraph (c) -- subparagraph (c) is the word
3 "severance" used, is that right?

4 A. Let me just take a read --
5 (Pause)

6 A. The word "severance" does not appear in this clause.

7 Q. And you would agree with me that severance payments don't
8 incentivize employees for future performance because, by
9 definition, they've already been laid off, correct?

10 A. Certainly, they would not be performing functions for the
11 firm at all, yes.

12 Q. Correct. After they're laid off, correct?

13 A. Yes, but it is a form of compensation for --

14 Q. I understand.

15 A. -- services rendered.

16 Q. Fair enough. Now you'll see in this provision, there's
17 also a reference to the financial statement that -- or the
18 financial schedule that we talked about earlier, right?

19 A. I see that reference, yes.

20 Q. Okay. And you understood that after discussions with Mr.
21 Clackson that that was the document that we talked about
22 earlier, correct, the M2?

23 A. I will say that I requested the schedule from Finance and
24 that's what I got. I don't recall what Mr. Clackson
25 particularly said about it.

1 Q. Got it. And you understood that that schedule had a two
2 billion dollar number for a comp, correct?

3 A. I see the word "comp" on the schedule and an amount of two
4 billion dollars, yes.

5 Q. Okay. And you would agree with me that while paragraph
6 9.1(c) refers to that schedule, there's no reference to that
7 financial schedule, or any financial schedule, in 9.1(b), isn't
8 that right? The provision dealing with severance?

9 A. There's no reference to a financial schedule in 9.1(b), I
10 don't believe.

11 Q. Correct.

12 A. As I said before, I'm not sure that the schedule that was
13 passed to me is, in fact, the schedule referred to in 9.1(c).

14 Q. That wasn't my question. I understand that.

15 A. I notice --

16 Q. I understand that. But you will agree there's no
17 financial schedule referred to in 9.1(b), correct? And that's
18 the provision dealing with severance.

19 A. Correct. There's no reference to any financial schedule.

20 Q. Okay. Let me draw your attention to the verb used in
21 9.1(c) for a moment. You see the opening line has the verb
22 "shall" or "shall cause"? Do you see that?

23 A. I do.

24 Q. And when you reviewed this document in September of 2008,
25 you understood the word "shall" to be imposing a mandatory

1 obligation on Barclays, right?

2 A. I have no view as to what Barclays' mandatory or otherwise
3 obligations under this contract may or may not have been.

4 Q. So --

5 A. I have no interpretation of this.

6 Q. -- you have no idea what "shall" means?

7 A. Not in a legal sense.

8 Q. Okay, but in a general sense.

9 A. I know what the verb means, yes.

10 Q. Okay. Well, it doesn't -- it suggests that something's
11 required, isn't that right?

12 A. In English, yes.

13 Q. You would agree with that? Okay. And so to the extent
14 Barclays' counsel in this case submitted papers to the Court
15 suggesting that it was not required for them to pay bonuses,
16 that would just be incorrect, right?

17 A. I can't pass a view on counsel's arguments. I'm not a
18 lawyer.

19 Q. Based on your understanding, Barclays had to pay some
20 bonuses, right?

21 A. I don't -- I do not know what this clause obligates
22 Barclays to do, but I understand that there was arrangements in
23 place to compensate former Lehman Brothers employees --

24 Q. You operated --

25 A. -- for pre-acquisition services.

1 Q. Okay. You operated on the assumption that it was
2 mandatory for Barclays to make some compensation payments to
3 Lehman employees, right?

4 A. Could you repeat the question?

5 Q. In doing your work in preparing your chart and monitoring
6 and tracking payments to Lehman employees, you operated under
7 the assumption that Barclays was obligated to make some
8 payments to those Lehman employees, right?

9 A. I did not know if we were obligated or not. The fact is
10 that we wanted to make payments and that's what we did.

11 Q. So it was altruistic?

12 A. I was not involved in the negotiations. I didn't make the
13 arrange -- I didn't make the deal.

14 Q. I haven't said --

15 A. I don't know what our obligations were. I understand that
16 there was a general expectation that we would pay an amount of
17 compensation --

18 Q. So --

19 A. -- in respect of pre-acquisition services. But what we
20 were obligated to do, I can't testify to that.

21 Q. So did you -- in working on this tracking of employments
22 for a period of time, you developed no understanding at all,
23 general or otherwise, that Barclays was obligated to make
24 payments to former Lehman employees?

25 A. No. It was not necessary for me to understand their legal

1 point to do my job.

2 Q. Okay. You were a party to some discussions within folks
3 at Barclays, people in the finance department, about whether
4 Barclays had to pay bonus amounts to former Lehman employees,
5 right?

6 A. I was involved in discussions with members of the finance
7 department and what they required me to do in support of their
8 role.

9 Q. Okay.

10 MR. HINE: Let me -- can we put up M24?

11 Q. Look at M24, Mr. Exall. Mr. Exall, this is --

12 MR. HINE: Your Honor, this is a document that's
13 already in evidence.

14 Q. Mr. Exall, this is an e-mail from Mr. Clackson to Mr.
15 Evans and Mr. Ricci dated September 17th. Do you see that?

16 A. I do.

17 Q. And the title is "650 million dollar problem". Do you see
18 that?

19 A. Yes.

20 Q. And when you went over to work on your new project in
21 connection with tracking payment to Lehman employees, Mr.
22 Clackson gave you a copy of this e-mail, didn't he?

23 A. Yes, he did.

24 Q. Okay. And that's 'cause he thought you should be apprised
25 of what's being discussed in this e-mail, right?

1 A. Mr. Clackson and I go back a long way and he thought I
2 would be interested in this.

3 Q. Right. So you read the e-mail when he gave it to you?

4 A. I did.

5 Q. Okay. So you were generally familiar with the topics
6 being discussed in this e-mail?

7 A. I wouldn't say generally familiar. I read the e-mail.

8 Q. Well, you understood the e-mail when you read it, correct?

9 A. I understood the -- I read the e-mail. I didn't have a
10 particular understanding of the problem but, yes, I read the
11 e-mail.

12 Q. Okay. You were new to the project at the time and you're
13 developing an understanding of what's going on. Is that fair
14 to say?

15 A. That would be correct.

16 Q. Okay. So you'll see in the e-mail of September 17th Mr.
17 Clackson writes: "This is a problem. They have two billion
18 dollars in the agreement. I was relying on you guys telling me
19 I needed 1.35 billion which gave me 650 million of goodwill
20 'cause the paragraph below says we have to pay it to them.
21 Can't use. Archie says you have agreed to this." Do you see
22 that?

23 A. I do.

24 Q. And when you read this document after Mr. Clackson gave it
25 to you, you understood that the reference to the paragraph

1 below was the citation to paragraph 9.1(c) that's contained in
2 the e-mail, right?

3 A. I see that 9.1(c) in there, yes.

4 Q. Well, you understood when he's talking about the paragraph
5 below, he's referring to paragraph 9.1(c), right?

6 A. That's what he's put in the e-mail, correct.

7 Q. Right. There's no reference in this e-mail to paragraph
8 9.1(b) relating to severance, is there?

9 A. Not that I can see.

10 Q. He doesn't attach a copy of 9.1(b), does he?

11 A. No.

12 Q. Okay. Now at some point in time, after receiving this e-
13 mail and doing your initial review of certain documents, you
14 yourself developed a view that -- or you developed a belief
15 that Barclays was obligated to pay two billion dollars in bonus
16 exclusive of the severance obligation, isn't that right?

17 A. No, that's not correct.

18 Q. Well, didn't you have a conversation with Mr. Guarnuccio
19 to that effect?

20 A. I recall speaking to Mr. Guarnuccio at around this time,
21 yes.

22 Q. And are you aware that your counsel or Barclays' counsel
23 has entered into a stipulation in this case and the stipulation
24 has been placed on the record that relates to your conversation
25 with Mr. Guarnuccio?

1 A. Yes.

2 Q. Okay. So --

3 MR. HINE: Can we pull up that stipulation for a
4 minute? From the June 25th transcript? Page 5.

5 Q. Now I direct your attention to lines 13 to 21. And I'm
6 going to read to you what Mr. Gaffey entered into the record.
7 And that's the stipulation I'm talking about. He entered into
8 the record the following statement:

9 "Barclays Capital Inc. (Barclays) and Movants stipulate
10 that if called to testify at trial, Michael Guarnuccio of
11 PricewaterhouseCoopers would testify as follows:

12 Michael Guarnuccio recalls that at some point in September
13 2008 after the Barclays/Lehman transaction closed, he spoke
14 with a Paul Exall. And Mr. Exall stated that he believed the
15 two billion dollar estimate was for bonus payments only not for
16 severance payments."

17 Do you see that?

18 A. I do.

19 Q. Now I understand you gave some testimony yesterday about
20 your questioning Mr. Guarnuccio's interpretation of what you
21 told him but you don't deny, in fact, that you had a
22 conversation with Mr. Guarnuccio, right?

23 A. Sure. I met Mike Guarnuccio, yes.

24 Q. You had conversations with him, right?

25 A. I had -- I believe I had a conversation at around this

1 time and a follow-up in January.

2 Q. Okay. And he was from PricewaterhouseCoopers, right?

3 A. Yes.

4 Q. And he was auditing Barclays' books at the time or engaged
5 in some kind of audit function?

6 A. He was engaged in the audit function, yes.

7 Q. Okay. And, in fact, when you did have that conversation,
8 you did express the opinion that the two billion dollar
9 estimate was for bonus only and not for severance, right?

10 A. I don't believe we discussed Barclays' specific
11 obligations under the APA. As I testified yesterday, I believe
12 Mr. Guarnuccio has misunderstood the extent of my knowledge at
13 this stage of the transaction. And I think he misunderstood or
14 inferred too much from the conversation we had.

15 Q. I understand you feel that way about his inferences, but
16 what did you -- I'm asking you about what you exactly said to
17 him --

18 A. I --

19 Q. -- not what your interpretation was, what your belief was
20 on the APA or your familiarity with the legal obligations of
21 the APA. You had a conversation with Mr. Guarnuccio and you
22 said to him that for whatever reason your belief at the time
23 was that the two million (sic) dollar estimate was for bonus
24 payments only and not for severance, isn't that true?

25 A. That was Mr. Guarnuccio's recollection. My recollection

1 is different. I do not recall specifically what was said in
2 that meeting. We may have used the terms in conversation
3 around "bonus", "bonus pool", "incentive comp", "compensation".
4 We were talking about Barclays' compensation plans in general
5 as well. I don't believe we talked about Barclays' obligations
6 at all.

7 Q. Did I hear you say you don't really recall what was said
8 at that conversation?

9 A. I took no notes of the meeting.

10 Q. So you don't have --

11 A. -- and none was sent to me from Mr. Guarnuccio

12 Q. You don't have a specific recollection of what you said to
13 Mr. Guarnuccio at that meeting, is that right?

14 A. That would be correct.

15 Q. Okay. You don't have a specific recollection one way or
16 the other whether you said what he's claiming you said, is that
17 right?

18 A. I have no specific recollection one way or the other, no.
19 At that point in time, as I said, I had no understanding of
20 what the APA required or obligated Barclays to do. That would
21 have been my state of mind at the time.

22 Q. I understand. But you have no specific recollection one
23 way or the other whether you said that to him, correct?

24 A. No.

25 Q. Okay. Now you do know that there were -- Mr.

1 Guarnuccio --

2 MR. HINE: You could take that down now, Steve.

3 Q. You know that Mr. Guarnuccio participated in further
4 discussions with people in Barclays about issues like that,
5 correct?

6 A. That's correct.

7 Q. Okay. And you weren't the maybe not the principal
8 participant in those discussions with him but you had some
9 involvement, right, fair to say?

10 A. I recall further meetings in January 2009 that -- a con --
11 particularly, a conference call that I was a participant of.

12 Q. Okay. Well, let me just take you before we get there to
13 November of 2008. And I'd like you to take a look at Movants'
14 Exhibit 801 in your binder. Do you see that as a -- that is an
15 e-mail. At the bottom, it's an e-mail between Mr. Walker from
16 Barclays to yourself. Do you see that?

17 A. I do.

18 Q. And it's cc'd to Mr. Romaine?

19 A. Yep.

20 Q. And it relates to a PwC request? Do you see that? That's
21 the subject?

22 A. Yes.

23 Q. Okay. And do you recall this e-mail?

24 A. Yes.

25 Q. Do you recall receiving this e-mail?

1 A. Sure.

2 Q. Okay. And do you recall sending the response that's above
3 it?

4 A. Yes.

5 MR. HINE: Your Honor, we would offer this exhibit
6 into evidence.

7 MR. BOIES: No objection, Your Honor.

8 THE COURT: It's admitted.

9 (Movants' Exhibit 801, e-mail thread dated November 2008
10 beginning with e-mail from James Walker to Paul Exall, was
11 hereby received into evidence as of this date.)

12 Q. Now let's look at the initial e-mail. Let's read it from
13 the bottom up, Mr. Exall. Mr. Walker, from the finance
14 department, writes you and says "Gary and I" -- Gary is Gary
15 Romaine, correct?

16 A. Correct.

17 Q. "Gary and I just had a conversation with Mike Guarnuccio,
18 lead U.S. partner covering Barclays at PwC. And as part of the
19 sign-off of the acquisition balance sheet, he is requesting a
20 copy of the schedule that shows the two billion dollar bonus
21 liability to Lehman folks." Do you see that?

22 A. I see those words, yes.

23 Q. And it continues: "He is referring to a 'accrued FY08
24 liability' schedule that is referenced in the asset purchase
25 agreement." Do you see that?

1 A. I do.

2 Q. And then he concludes asking you: "Is there something
3 that you have that you can share with PwC?" Correct?

4 A. Yes.

5 Q. Okay. And then you understood that inquiry to be talking
6 about bonus liability, correct?

7 A. Those are the words James used, yes.

8 Q. Excuse me?

9 A. Those are the words James used.

10 Q. Right. There's no reference in the e-mail from Mr.
11 Walker --

12 MR. HINE: Steve, go back to the other one. The whole
13 e-mail, Steve.

14 Q. There's no reference in Mr. Walker's e-mail to you about
15 severance, is there?

16 A. That's correct. He refers to the copy of the schedule
17 referred to in the APA.

18 Q. Right. And he mentions the two billion dollar bonus
19 liability, correct?

20 A. Yes. He's -- he uses that word. But I would say is that
21 when you're talking between --

22 Q. That's the phrase he used.

23 A. That's the phrase he used. When you're talking between
24 the nature of professional or compensation professional and the
25 finance person, for example, or anyone else in another field,

1 these are colloquialisms that people use.

2 Q. Sure.

3 A. And in fact, the word "bonus" was, in fact, used in Clause
4 9.1(c). And if James did not have a copy of this purported
5 schedule, that's the word he would have used.

6 Q. Sure. But he did use the word "bonus", right?

7 A. He used the word "bonus".

8 Q. And he did not use the word "severance", correct?

9 A. No, he didn't.

10 Q. And then if you continue on his line, he talks about a
11 defined term, "accrued FY08 liability". Do you see that?

12 A. I see that.

13 Q. And that's a defined term from Clause 9.1(c) of the APA,
14 isn't it?

15 A. It's in Clause 9.1(c). I don't know what it's
16 particularly defined as, but yes.

17 MR. HINE: Okay. Well, let's look at 9.1(c), Steve,
18 please, which is M1.

19 Q. And you'll see 4 at the top of that provision, there's a
20 definition of "accrued 08FY liability". Do you see that?
21 About the sixth, seventh line down?

22 A. I see it referenced, yes.

23 Q. Okay. So that's -- you understood when you received that
24 e-mail from Mr. Walker that he was referring to 9.1(c),
25 correct?

1 A. Sure.

2 Q. Sure. Okay.

3 MR. HINE: And let's go back to the e-mail, Steve,
4 please. M108.

5 Q. So you understood this request when Mr. Walker sent it to
6 you, right?

7 A. I understood he requested a copy of the schedule that's
8 purported to be represented in that clause, yes.

9 Q. Right. And you responded to him and said "Here's a
10 scanned copy." Right, in the e-mail above?

11 A. Yes. I say "Here's a scanned copy. You will see the two
12 billion described as comp."

13 Q. Right. So you're referring to the two billion that's in
14 his e-mail and you're pointing out that it's described as comp.

15 A. That's what it says on the schedule that was passed to me
16 by Finance when I requested it, yes.

17 Q. And if we turn to the second page of this document, you'll
18 see that you, in fact, forwarded him a copy of what we've
19 marked as Exhibit M2, the financial schedule, correct?

20 A. That's correct.

21 Q. Okay. And so, at the time you sent this e-mail, November
22 2008, you were sufficiently familiar with the provisions of the
23 APA to at least know what schedule to forward him in response
24 to his query, right?

25 A. Well, yes, in the sense that when I first read the APA, I

1 requested from Finance a copy of the schedule --

2 Q. Correct.

3 A. -- which was passed to me by Finance. And I'm effectively
4 sending the same schedule that they sent to me back to them.

5 Q. Sure. Sure. Well, you're sufficiently --

6 A. Yes.

7 Q. -- sufficiently familiar with the paragraph 9.1(c) to know
8 that that's what he was talking about when he was asking you,
9 correct?

10 A. It's the same question I had asked earlier, so yes.

11 Q. Okay. And you'll see later on up the e-mail chain
12 apparently they forward your schedule to -- they forward that
13 schedule to PwC, correct?

14 A. That's correct.

15 Q. Okay. And in response to your forwarding the schedule, no
16 one said, hey, you got the wrong schedule, right?

17 A. I don't believe so.

18 Q. Okay. No one said, hey, that schedule's not initialed by
19 a Barclays officer. We shouldn't send it to PwC. Did they?

20 A. I can't tell -- I mean Finance responded to an ordered
21 request.

22 Q. Okay. But you don't recall anyone saying that and not
23 forwarding it to PwC 'cause it wasn't initialed by a Barclays
24 officer, do you?

25 A. No. We, in fact, did forward it to PwC.

1 Q. Okay.

2 A. I do recall --

3 Q. Do you recall --

4 A. -- discussions at the time -- sorry -- to elaborate, I do
5 recall discussions at the time where I said, hey, this is
6 initialed by one person but this is the schedule that was
7 passed to me. And their OC passed it on to PwC as requested.

8 Q. Okay. So you read the APA sufficiently to know that there
9 was a provision in there that talked about a schedule being
10 initialed by both parties, right?

11 A. Sure.

12 Q. Sure. Okay. And when you forwarded this -- when they
13 forwarded the schedule on to PwC, no one said -- provided you
14 any feedback and said, hey wait, this schedule applies to both
15 bonus and severance, did they?

16 A. I don't recall anyone coming back to me on that either
17 from Finance or PwC.

18 Q. Okay. And it's fair to say that the discussions between
19 Mr. Guarnuccio and members of Barclays continued even after
20 November on this topic of -- this topic, right?

21 A. Certainly. The accounts were only signed by PwC, I would
22 say, in and around February 2009. And I recall being on a
23 conference call with Mr. Guarnuccio as well as some of our
24 finance people in late January 2009.

25 Q. Okay. So you were on a conference call on January 27th,

1 2009 scheduled at 8 a.m. between Mr. Guarnuccio and his team
2 and yourself to discuss what may have to be paid out of two
3 billion dollars, right?

4 A. I believe Mr. Guarnuccio had some questions of Gary
5 Romaine. And we -- I believe a conference call had been
6 arranged to discuss those questions at that meeting prior to
7 the PwC signing off on the --

8 Q. And you recall --

9 A. -- which then affected --

10 Q. You recall that conversation -- that conference call
11 taking place, right?

12 A. Absolutely.

13 Q. And you were on it?

14 A. I was on it.

15 Q. So you had sufficient understanding of the issues to be on
16 a conference call with PwC relating to this discussion,
17 correct?

18 A. PwC had some questions that they wanted to discuss.

19 Q. And sometime after that conference call, PwC eventually
20 signed off on how Barclays was accounting for the compensation
21 payments to Lehman employees, right?

22 A. I believe so. They signed our report of accounts which
23 would eventually -- as their official auditors of which the
24 acquisition accounting was a part.

25 Q. Okay. And that's -- you testified about that yesterday,

1 right? At some point, PwC -- at some point after January of

2 '09, PwC signed off on your report of accounts, correct?

3 A. Yes. I believe most of the queries -- or all of the

4 queries must have been resolved by then, so yes.

5 Q. Okay. I want to take you back to September 2008 again --

6 A. Okay.

7 Q. -- when you first began tracking or working on this

8 project to track the bonus payments or any kind of compensation

9 payments paid to Lehman employees. When you first began

10 tracking the bonus payments, you used a number that was

11 considerably lower than two billion dollars, right?

12 A. I used -- I was instructed to use in the daily updates

13 that I was preparing a reference point of 1.4 billion.

14 Q. Correct.

15 MR. HINE: Could we see one of those documents?

16 Q. It's under tab M91 of your book.

17 A. Yep.

18 Q. And you recognize the covering e-mail as an e-mail

19 forwarding from Michael Evans to several other people on

20 September 23rd an update chart that you prepared, right?

21 A. Yes. I prepared that document.

22 Q. Michael Evans is your boss, correct?

23 A. Michael Evans was my direct line manager and the

24 recipients of the executive committee at Barclays Capital.

25 Q. Okay. So you -- and if we turn to the next page, we'll

1 see the report that he's forwarding. And it's a -- entitled a
2 "Summary Report", right?

3 A. That's correct.

4 Q. And this is a daily -- or at that time, it was a daily
5 prepared report where you were tracking bonus payments to
6 former Lehman employees who were now working at Barclays,
7 correct?

8 A. At that time, we were doing it twice a day, once in the
9 morning and once in the evening. And it was to track
10 guaranteed payments or payments that had been guaranteed in
11 contracts to former Lehman Brothers employees for pre-
12 acquisition services. It also facilitated some modeling around
13 what that would impact or how that would impact the residual
14 population in general that would not be receiving or had not
15 received at that time guaranteed contracts.

16 Q. Okay.

17 A. It was also any other ancillary matters that may or may
18 not be relevant that we felt the executive committee of
19 Barclays Capital may or may not need to know or may need to
20 know about it at the time.

21 Q. Okay. Now it's fair to say -- I think you told me at your
22 deposition you prepared the first one of these reports?

23 A. That's correct. I prepared several of the first
24 iterations. And I think some of my team came across and
25 assisted me and I reviewed each one daily.

1 Q. Okay. So eventually, your team gets involved in preparing
2 these reports either a daily basis or a twice daily basis,
3 correct?

4 A. Correct.

5 Q. And you wanted to be ensured that these reports are
6 accurate because they're going to the executive committee at
7 Barclays, right?

8 A. That would be advisable.

9 Q. Right. And it's fair to say that you reviewed these
10 reports before they went to the executive committee, correct?

11 A. Yes, I did.

12 Q. Okay. Now, I just want to look at a couple of the entries
13 on this report. And the first line, you talk about the Elite
14 8. Do you see that?

15 A. Yes.

16 Q. And I think in a footnote, you highlight the fact that
17 that's a select number of very senior Lehman executives who are
18 now working at Barclays, right?

19 A. Yes. They were senior executives at Lehman. I don't
20 recall specifically whether all of them actually ended up
21 working for Barclays, but yes.

22 Q. Okay. But --

23 A. At that time.

24 Q. -- they were known as a colloquial phrase, the "Elite
25 8" --

1 A. Yeah.

2 Q. -- is that right?

3 A. Although there are nine of them, strangely.

4 Q. There are nine of them, right. You sure you were checking
5 this for accuracy?

6 A. I didn't come up with the name.

7 Q. Before we get to the Elite -- I want to just focus on the
8 Elite 8 for a second and ask you about a declaration that
9 you've submitted in this case. Do you recall preparing a
10 declaration to be submitted in this litigation?

11 A. Not particularly.

12 Q. Okay. Well, let's look at BCI Exhibit 356. It should be
13 in your binder, Mr. Exall.

14 A. Sorry. I found it, yes.

15 Q. And that's a declaration that you prepared in connection
16 with this litigation, correct?

17 (Pause)

18 A. Yes. I've signed this.

19 Q. That's your signature on the last page?

20 A. It is.

21 Q. Okay. And this declaration is to summarize some of the --
22 for certain select senior executives of Lehman who now came
23 over to Barclays, both their 2007 compensation and their 2008
24 compensation, correct?

25 A. Can I read the document?

1 Q. Yeah.

2 (Pause)

3 A. I've read the document. Could you repeat the question,
4 please.

5 Q. I just wanted to describe the document. This is a summary
6 of compensation information related to certain senior
7 executives of Lehman. And it lists their 2007 base salaries
8 and bonuses and their 2008 base salaries and bonuses, is that
9 right.

10 A. In most cases --

11 Q. In most cases.

12 A. Yeah. And I would say that the 2007 compensation would be
13 based on information that was available to us at the time from
14 the former Lehman Brothers estate.

15 Q. Well, that was going to be my question. You don't -- you
16 assembled this information based on a review of books and
17 records available to you at the time, right?

18 A. Yes. The information was passed to us as part of the
19 acquisition process. And that would have been the source data.

20 Q. Okay. And you did your best to review the available data
21 and come up with the numbers in this declaration, right?

22 A. That's correct.

23 Q. Do you have any reason to doubt the accuracy of any of
24 these numbers?

25 A. I don't believe so.

1 Q. Okay.

2 MR. HINE: Your Honor, we'd like to offer this
3 document into evidence.

4 MR. BOIES: No objection, Your Honor.

5 THE COURT: It's admitted.

6 (BCI Exhibit 356, declaration of Mr. Exall summarizing
7 compensation information related to certain senior executives
8 of Lehman, was hereby received into evidence as of this date.)

9 Q. And the reason I brought this document up, I just want to
10 ask you one question before we discuss your prior chart. I see
11 in reference o some of these individuals and, in particular,
12 I'll point you to paragraph 11. You'll see a reference to
13 something called a "special cash award". Do you see that?

14 A. Yes.

15 Q. Now a special cash award, to your understanding, a special
16 cash award is not a bonus, is that right?

17 A. This was a -- I believe, if it's the special cash awards
18 to which I'm thinking, it was retention awards --

19 Q. Right.

20 A. -- for certain formerly Lehman employees.

21 Q. I just want to distinguish between bonuses for pre-
22 acquisition activities at Lehman and special cash awards were
23 for retention to ensure those people stayed on at Barclays,
24 right --

25 A. That's correct.

1 Q. -- in general? Okay. So in your understanding, a special
2 cash award would not be considered a bonus under 9.1 of the
3 APA, right?

4 A. Again, I don't know what 9.1 means --

5 Q. Right.

6 A. -- in a legal sense. What I can tell you is that those
7 special cash awards would not have been on the schedule that I
8 prepared because they relate to -- they do not relate to pre-
9 acquisition services of former Lehman Brothers employees. When
10 you say I don't understand them to be a bonus, again, I come
11 back to the colloquial use of the term "bonus". If you ask a
12 finance professional or any other professional, it's not a
13 complex but they may would refer to that as a bonus.

14 Q. I understand. So just as -- but the main point I wanted
15 to get is that on that schedule that we talked about earlier,
16 M107, you did not include special cash awards as bonuses,
17 correct, because they were not pre-acquisition --

18 A. They're not on that schedule.

19 Q. -- compensation. Correct. Okay. Now let's go back to
20 the schedule we were previously talking about which is M91,
21 please. Now, I just would like to --

22 MR. HINE: Could you blow up the top chart, Steve,
23 with the footnotes?

24 Q. Now you'll see -- I just want to get a little groundwork
25 here on what this all means. In the left-hand column, you are

1 -- in the upper left-hand two blocks, you are tracking
2 guaranteed bonuses to both the Elite 8 and another group of
3 some 383 individuals, correct?

4 A. At that point in time, yes.

5 Q. Yes. This is as of the date of the report, right?

6 A. That's correct.

7 Q. Okay. And GB means "guaranteed bonus"?

8 A. Yes.

9 Q. Okay. And if I look to the column marked actual, I will
10 see at that point in time you were tracking or planning on
11 paying those 402 senior individuals a total of 862 million in
12 bonuses, right?

13 A. That would have been the aggregate of the contracts that
14 we had -- would have at that time issued to those people, yes.

15 Q. All right. At that time, the aggregate you expected to
16 pay for those 402 people was 862 million dollars?

17 A. That would be fair to say, yes.

18 Q. And if we look to the black to the right, you'll see "One
19 Time Deferred Cash Award". Do you see that --

20 A. I do.

21 Q. Yes? And that is to encompass these special cash awards
22 that we just talked about, right?

23 A. That's correct.

24 Q. So they're not bonuses; they're the retention payment that
25 you just described earlier, correct?

1 A. They're the retention payments, yes.

2 Q. Right. Okay. And the last block on the right talks about
3 "Second Year Guaranteed Bonuses". And that relates to certain
4 people who had guaranteed bonuses the second year after coming
5 to Barclays, right?

6 A. That's correct.

7 Q. Okay. Now let's go down the left-hand column briefly.
8 After you get past these 402 people, there's 10,000 some odd
9 people who are expected to come to Barclays, correct?

10 A. Yes.

11 Q. And again, this is all based on your understanding at that
12 particular date, right?

13 A. That's correct.

14 Q. Okay. And of that 10,000 some odd people, they weren't
15 guaranteed bonuses but there was a plan to pay them some form
16 of bonus, right?

17 A. That's correct.

18 Q. Okay. And -- but of that 10,000 people, 3300 were going
19 to be laid off because they were planned redundancies, right?

20 A. Yes. There was -- there was a plan being put in place or
21 in place, I don't recall the exact nature of it, whereby there
22 would be redundancies across the firm as a whole.

23 Q. Right. And so as of the date of this report, September
24 23rd, you were -- they were planning on laying off -- Barclays
25 was planning on laying off 3300 of those 10,000 people,

1 correct?

2 A. That's correct.

3 Q. And there's no bonus payment included in the next block
4 for those people there. They're not -- Barclays isn't expected
5 to pay them a bonus, right?

6 A. They would be eligible for severance.

7 Q. They would get severance not a bonus, correct.

8 A. Yes. But as I mentioned before, oftentimes when you're
9 negotiating a settlement of severance, there will be some
10 consideration of prior year bonus and that may or may not be
11 included in the final settlement amount.

12 Q. But you're not -- aside from that distinction, those
13 people are entitled to severance in Barclays' view but not a
14 bonus, correct?

15 A. They would be eligible for severance in the plan
16 redundancy, yes.

17 Q. Right. And if we look down at Footnote 1 -- well, before
18 we get to Footnote 1, that leaves a total of about 6700 some
19 odd people. And the plan at that point was to pay them an
20 aggregate amount of 538 million dollars in bonus, correct?

21 A. That's not the plan. That's just a simple mathematical
22 calculation. You have to read this document in its entirety
23 because it required a plan at this time. But the reference
24 point of 1.4 billion of funds was clearly insufficient to
25 deliver the kind of compensation plans that Barclays had in

1 fact at the time. If you turn the page to page 2, there's a
2 sensitivity analysis section which identifies that issue
3 further and suggests that we're between 270 and 370 million
4 dollars lacked on the 1.4 billion reference point.

5 Q. Okay. So the reference point that you're using is what's
6 entitled "Total Pool Funding of Hours". Do you see that?

7 A. I see that, yes.

8 Q. And that's 1.4 billion?

9 A. That's what it says.

10 Q. Correct? And that's the number you were given by Mr.
11 Evans?

12 A. That was the reference point Mr. Evans asked me to use for
13 that chart.

14 Q. Mr. Evans is your boss?

15 A. Correct.

16 Q. Okay. And so, according to this chart, there was a pool
17 available of 1.4 billion to pay bonuses, 862 million of which
18 was going to go to the 402 most senior people. And the balance
19 would be left to be divided up against the 6700 others,
20 correct?

21 A. Taken in isolation, that's what it says. Again, you have
22 to read the document to put it in full context.

23 Q. I -- we'll get there. And before we get there, let's talk
24 about Footnote 1. You say in Footnote 1 that this is -- and
25 this is in relation to the residual pool of people left. "All

1 the moving" -- I'm sorry. I can't read it myself. "Still
2 moving and a net of an expected 3300 redundancies expected to
3 cost about a hundred million. Not funded out of the 2008 bonus
4 pool." You see that?

5 A. Yes.

6 Q. So the funding for the severance was coming out of a
7 separate pool from the bonus pool, right?

8 A. I think what I'm referring to here is the 1.4 billion --

9 Q. Right.

10 THE COURT: -- which is described here as "Pool
11 Funding".

12 Q. Right. So the --

13 A. So it's not coming out of that 1.4 billion --

14 Q. The hundred million --

15 A. -- that's being used for this chart.

16 Q. Right. The expectation, at least at the time you prepared
17 this chart was that the 3300 people would get a hundred million
18 dollars in aggregate in severance, correct?

19 A. They would have -- that's what it says.

20 Q. Right. And that is separate and apart from the 1.4 that's
21 in this bonus pool for a bonus, correct.

22 A. It's separate to this reference point, yes.

23 Q. Right. So this chart matched an expectation of having to
24 pay a total of 1.5 billion dollars in severance and bonus,
25 correct? If you add the one hundred to the 1.4 billion, I get

1 to 1.5 billion dollars, right?

2 A. If you do the arithmetic, that's what this chart in
3 isolation says. However, I would say that as this document
4 clearly identifies, at the time, we were very clear. This went
5 to the executive committee at Barclays Capital. The 1.4
6 billion reference point was going to be insufficient to the
7 tune of 270 to 370 million dollars as modeled to deliver the
8 kind of compensation that Barclays in fact wanted to do.

9 Q. Wanted to do?

10 A. Well, was planning to do in terms of the target as
11 specified in this document.

12 Q. Well, so you're referring further down on this page to the
13 funding pressures that you highlight that are putting pressure
14 on the original bonus pool estimate of 1.4 billion, is that
15 right?

16 A. That's it.

17 Q. And the rest of this memo is to highlight the executive
18 committee, the fact that we might blow the 1.4 pool, correct?

19 A. That's what this document is intended to demonstrate. And
20 my personal opinion was that we were going to substantiate or
21 exceed the 1.4 billion which is, in fact, what we did.

22 Q. Okay. Now you were told to use this 1.4 billion dollar
23 pool by your superiors, correct?

24 A. That's correct, as a reference point.

25 Q. Okay. And that is on or before September 23rd, 2008 you

1 were given that number, right?

2 A. I think it was on that date.

3 Q. Okay.

4 A. It was for the first iteration of this document.

5 Q. Okay. And that's less than a week after the date when the
6 Court was told that Barclays was going to pay two billion
7 dollars in comp, correct?

8 A. I have no knowledge of what the Court was told.

9 Q. Okay.

10 MR. HINE: Can we go to Exhibit M145, please?

11 Q. It's in your binder, Mr. --

12 A. Yes. I'm here.

13 Q. And this is a -- do you recognize this document, Mr.

14 Exall? I'm sorry. It's M145. Do you recognize this document,
15 Mr. Exall?

16 A. This one in my binder -- yes. Yes.

17 Q. Yes.

18 MR. HINE: This document is already in evidence, Your
19 Honor.

20 Q. This is a e-mail exchange involving you and Mr. Evans and
21 a Ms. Pamela Sinclair, correct?

22 A. Correct.

23 Q. Okay. And in general, it's talking about -- it's actually
24 dated the same date as the prior exhibit, right? September
25 23rd?

1 A. I see that date.

2 Q. Right. And we're -- and you're talking about, in general,
3 the issues you just mentioned, correct?

4 A. In part. The context is that the business were under
5 extreme pressure to retain individuals. Understandably, given
6 the circumstance, we had 25,000 Lehman Brothers employees
7 across the globe looking for new jobs. And we were under
8 pressure to retain them. And the business was requesting our
9 assistance in that. And I believe in this e-mail, we're
10 requesting the consideration of issuing further guaranteed
11 bonus to top talent to secure their services for the
12 foreseeable.

13 Q. In other words, you're raising the problem associated with
14 the original expectation to pay 1.4 pool. That's a lot more
15 businesses within Lehman -- or what used to be Lehman is now
16 Barclays. There's a lot more businesses that want to pay
17 bonuses to lower level employees than originally expected. Is
18 that generally correct?

19 A. I wouldn't say it was a reference to the 1.4 billion. I
20 don't know particularly how the 1.4 billion actually came
21 about. What I can say is that there were tremendous pressures
22 to retain these people --

23 Q. Right.

24 A. -- no matter what reference point we were using. The
25 request was to issue guarantees at a lower level. The original

1 intention was to issue guarantees to a select group of people,
2 150 to 200 -- if I recall -- people. We ended up issuing
3 guaranteed bonus contracts to substantially more people than
4 that because of the retention concerns.

5 Q. Okay. And then when you -- and so, in addressing that
6 issue, you made some recommendations on page 2 of this
7 agreement -- of this document, right?

8 A. Yeah. These were hypothetical arguments or suggested
9 responses that we could discuss further and form a view on.

10 Q. Right. And you've titled them on page 2 "Strawman
11 Approaches"?

12 A. That's correct.

13 Q. That's your phrase for suggesting --

14 A. It's probably a poor choice of words given its legal
15 connotation but it's a hypothetical set of responses for
16 discussion.

17 Q. Okay. And the first option is do nothing, right?

18 A. Yes.

19 Q. The second option says "Model and allocate specific
20 guaranteed bonus pools to individual business areas to manage
21 within the overall 1.4 billion." Is that right?

22 A. That's what it says.

23 Q. And if we continue on to the second page, you're talking
24 about the disadvantages of that approach. You write, "Spending
25 more than 1.4 is dilutive to current negative goodwill

1 calculation." Do you see that?

2 A. That's what it says.

3 Q. And diluting the negative goodwill calculation was a
4 concern of senior management at Barclays at the time, right?

5 A. Yes. Well, I can't speak for senior management at
6 Barclays. I understand from the e-mail that Mr. Clackson sent
7 to me that there was a he has raised the issue around 1.35
8 billion and the 650 goodwill -- negative goodwill calculation.
9 And this is a reiteration of that understanding at the time
10 from his e-mail. I simply rounded it to 1.4 billion.

11 Q. Okay. Now, Mr. Exall, I'd like to get to your chart that
12 you talked about yesterday.

13 A. Sure.

14 Q. Before we do, I would like to show you an excerpt from
15 Barclays' brief in this case, which I know you haven't seen,
16 but I just want to point out one sentence to you.

17 A. Okay.

18 Q. And that is Barclays' opposition brief at page 136.

19 A. Sorry. Which section of the binder is this in?

20 Q. I don't think it's in the binder.

21 A. Oh.

22 Q. I just want to show you one sentence.

23 A. Okay.

24 MR. HINE: Steve, can you highlight the sentence in
25 the middle of the paragraph 300. "Barclays has paid" --

1 Q. I just want to get your orienta -- orient you to an issue
2 that's going to come up while we talk about your chart, Mr.
3 Exall. You'll see this is a excerpt from Barclays' brief where
4 they say: "Barclays has paid or promised to pay for 2008
5 approximately 1.66 billion in bonuses, 265 million in severance
6 payments and approximately twenty-one million in taxes." Do
7 you see that?

8 A. I see that statement.

9 Q. And if we continue on to the next page, it says, "These
10 liabilities total 1.946 billion, an amount fully consistent
11 with the two billion dollar as to the parties." Correct? Now,
12 the reason --

13 A. I see that.

14 Q. -- I point this out to you is I want to draw your
15 attention to the 1.946 billion. You'll agree with me that
16 that's five million dollars off the number that's on your
17 chart, right, which was 1.951, correct?

18 A. It's five million dollars difference, yes.

19 Q. Yes. Okay. I just wanted to highlight that issue. We'll
20 come back to that five million. But I wanted to point that
21 out.

22 A. Okay.

23 Q. Now before we get to your chart, I'd like to look at the
24 earlier version of your chart that we mentioned earlier, which
25 is Exhibit M218. And this is the original version of your

1 chart that you sent -- that was sent to the movants. And you
2 replaced this later with the version that you testified about
3 yesterday, correct?

4 A. I see the Bates stamp. I recognize that number from the
5 earlier testimony, yes.

6 Q. Yes. And you recognize --

7 A. That was the original form of the document, yes.

8 Q. Yes. And this was prepared in or around, I believe you
9 testified at your deposition, in or around July of 2009 after
10 the start of this litigation, right?

11 A. I don't recall what I testified in my deposition
12 specifically. I do recall we were tracking these payments
13 throughout the process. I think we produced a specific
14 document as requested.

15 Q. Okay. Well, let's look at page 69 of your deposition.

16 A. Okay.

17 Q. And we are talking about this original spreadsheet at the
18 time, which is Exhibit 280B. And if you look -- starting at
19 line 5, the question is:

20 "Okay. So just tell me, just to be specific here, 280B
21 was prepared at or about what date?"

22 "A. This was, I understand, supplied to yourselves on or
23 around the middle of July 2009."

24 Is that right?

25 A. That's what it says.

1 Q. So that's about the date that it was supplied in this
2 litigation, correct?

3 A. That's correct. I'd go on to say that the spreadsheet did
4 exist in previous forms and formats. But I think we cleaned up
5 the presentation for the purposes of presentation.

6 Q. I understand that. Okay. And when you look at this first
7 chart --

8 MR. HINE: Back to M318, please?

9 Q. -- you'll see that it comes to a total of 1.999 billion
10 dollars, right?

11 A. That's correct.

12 Q. And we've heard a lot in this case about the chaos and
13 tumult with all this period of time and how difficult it was to
14 track things. When you did this chart many months later, did
15 you remark to anyone or did you say to anyone, holy crow, in
16 all that chaos, we came to one million dollars off of the two
17 billion dollar number that we were shooting for?

18 A. We weren't shooting for any particular number. We were
19 tracking payments made to former Lehman Brothers employees.

20 Q. Okay. Did you say to anyone, unbelievably, this chart
21 comes to less than one-tenth of a percent from that two billion
22 dollar number? Did you say that --

23 A. I don't believe, sir. This schedule was still moving at
24 the time as we've seen. The replacement schedule was updated
25 subsequent to this. There were still severance payments that

1 were still being ironed out. And this was the version at the
2 time. And it subsequently moved on. We were aware of that and
3 I think we informed counsel of that. Or --

4 Q. And this is the first version that was sent to the
5 movants, right?

6 A. Yes.

7 Q. Okay. Later you had to change this version because you
8 realized the severance payments listed on this chart were
9 overstated, right?

10 A. That's correct. There was a double count error between
11 the severance line on this schedule and the bonus line.

12 Q. Okay.

13 A. And as certain severance payments were, in fact, made,
14 they differed substantially from the amounts that were
15 estimated at the time for this schedule. Consequently, I think
16 in aggregate, these numbers came down by about fifty million
17 dollars --

18 Q. Okay. So let's go to your --

19 A. -- as an estimate.

20 Q. -- schedule now that we've talked about -- we've been
21 talking about, M107. And the total number that this schedule
22 comes to is 1.951, correct?

23 A. Correct.

24 Q. And that's forty-nine million dollars short of the two
25 billion dollar number, right?

1 A. That's forty-nine million dollars short of two billion
2 dollars.

3 Q. Right. And I just want to go through some of these
4 entries. You went through them yesterday. But I'd like to go
5 through them in a little more detail. On the OBS, opening
6 balance sheet compensation accrual, you see a number of 2.0,
7 two billion dollars, right?

8 A. Yes.

9 Q. And the source of that number is the APA?

10 A. That's what I was informed, yes.

11 Q. And you were told that by Mr. Clackson?

12 A. Mr. Romaine asked me to prepare that.

13 Q. Mr. Romaine, okay. So that's just a number you were given
14 by others.

15 A. Yes. And the -- yes, that's correct.

16 Q. Okay. And if we continue down on the next item, it says
17 "Pre" -- and so -- starting with that number, you're mapping or
18 you're tracking the payments that have been made by Barclays to
19 Lehman employees under different categories, correct?

20 A. Different categories of compensation, correct.

21 Q. Right. And so let's look at the first one. "Pre-9/22
22 payroll items". You see that?

23 A. Yes.

24 Q. And that's twelve million dollars?

25 A. That's correct.

1 Q. And that's comprised of two different components, right,
2 generally?

3 A. I believe so.

4 Q. Seven million of that is a tax, right? It's a payment of
5 a tax for former Lehman employees that were old -- with respect
6 to former Lehman employees?

7 A. I believe the -- my recollection at the time is that they
8 were tax payments due and payable to relevant tax authorities
9 for expatriates --

10 Q. Right.

11 A. -- that worked for former Lehman Brothers. And they were
12 due and payable to those authorities. We made those payments
13 on their behalf and for their benefit.

14 Q. Right. Okay. So that's seven billion out of the twelve
15 is a tax payment, correct?

16 A. Correct.

17 Q. And you would agree with me that those former Lehman
18 employees didn't get that money. That money went to a tax
19 authority, right?

20 A. Yes, it was, but it was for their benefit.

21 Q. Okay. So now if we turn back to 9.1(c) --

22 (Pause)

23 Q. -- you'll agree with me that there's no provision in here
24 discussing payments to tax authorities on behalf of the
25 termin -- transferred employees, is there?

1 A. I'll have to reread the section.

2 Q. Okay.

3 (Pause)

4 A. There's no reference to tax authorities.

5 Q. Okay. This language contemplates payments to the
6 transferred employees themselves, right?

7 A. I don't -- I can't interpret this laws.

8 Q. You can't tell?

9 A. I'm not a lawyer.

10 Q. Fair enough.

11 MR. HINE: Let's go back to the chart.

12 Q. Now, out of that twelve million dollars, the remaining
13 five is a -- are payroll items, right?

14 A. Yes. Payroll related items.

15 Q. So that could include base salaries as well as payroll
16 related benefits that Barclays paid on behalf of certain
17 employees -- or two certain employees.

18 A. Yes, that's correct. The circumstance at the time was
19 such in the chaos around these dates, there were payrolls in --
20 particularly in the U.S. or North America in general that
21 needed to be -- employees needed to be paid for the month.

22 Q. Right.

23 A. There was no funding available from the former Lehman
24 Brothers estate. What Barclays did was make good on those
25 payrolls. There were no -- I don't believe or I was -- I don't

1 believe they were under any requirement to do so. But I think
2 to keep the business running, to retain the people, was part of
3 the overall retention strategy. We made those payments.

4 Q. Okay. And those are just the weekly payroll payments that
5 employees receive, right?

6 A. That's my belief. That's what I --

7 Q. The base salary, not their bonus compensation, correct?

8 A. No. There are no bonuses generally paid before the
9 stipulated period.

10 Q. Right. And in general, it's their base salary, right?

11 A. It would be their base salary, their benefits, all sorts
12 of related compensation items.

13 Q. Right. And if we look back at 9.1(c), you recall the
14 provision that says "but not base salary", right?

15 A. It says those words.

16 Q. Okay. So that five million dollars could not possibly
17 fall under the ambit of 9.1(c), right?

18 A. I don't know what 9.1(c) requires. What I can tell you is
19 that that five million dollars was paid to former Lehman
20 Brothers employees for pre-acquisition services for Lehman
21 Brothers.

22 Q. Okay.

23 A. And that is why it is on the schedule.

24 Q. And it's principally their base salary, right?

25 A. Yes.

1 Q. Okay. Now this five billion (sic) explains the difference
2 between Barclays' brief where they used the 1.946 number and
3 your chart which is 1.951, isn't that right?

4 A. Mathematically, that's the case. I don't know whether
5 that's the reason.

6 Q. Okay. Fair enough. Let's move on to the next item on the
7 chart. I think you testified yesterday about replacement RSUs.
8 Those are, in fact, Barclays' assuming a stock bonus obligation
9 that Lehman previously owed, right?

10 A. A portion thereof, yes. And we replaced them with cash.

11 Q. Okay. Now the next item is "Bonus including social tax".
12 Do you see that?

13 A. I do.

14 Q. So a portion of that is bonus and a portion of that is a
15 tax, right?

16 A. Relevant taxes, yes.

17 Q. Okay. And you would agree with me that those tax payments
18 were paid to some tax authority not to the individual employees
19 themselves, correct?

20 A. That would be the case.

21 Q. Okay. And --

22 A. They are clearly bonus related.

23 Q. Excuse me?

24 A. They're clearly bonus related.

25 Q. Sure.

1 A. They're related specifically to these bonuses.

2 Q. The bonus was paid to the individuals but the tax was paid
3 to a taxing authority, correct?

4 A. That's the norm.

5 Q. Okay. And at your deposition, you estimated the amount of
6 social tax embodied in that to be about fifty million dollars,
7 right?

8 A. I recall that it's quite low given the low social taxes in
9 the U.S., yes.

10 Q. Do you think it might be higher than that?

11 A. No.

12 Q. Okay. So it's about fifty million dollars? We can agree
13 on that?

14 A. That's what I estimated in my deposition. I have no
15 reason to change that.

16 Q. Okay. And like any -- so we don't have to go through all
17 the taxes, all the tax entries on here were paid to a tax
18 authority and not to the individual employees themselves,
19 right?

20 A. That's correct, although I would say that any cash bonus
21 paid to any employees are subject to any withholding tax at any
22 point in time --

23 Q. Sure.

24 A. -- and payable to any tax authority.

25 Q. Sure.

1 A. So in that sense, it's not really different.

2 Q. I understand. I'm just saying the taxes were not paid to
3 the individuals themselves. They were paid to a taxing
4 authority, correct?

5 A. That's correct.

6 Q. All right. Next you have IBD drive programs which is
7 again just Barclays assuming a bonus type obligation that
8 Lehman used to owe, correct?

9 A. Yes.

10 Q. Okay. Now you see two entries for severance. The first
11 one is 238 million dollars. You see that?

12 A. Yes.

13 Q. And that's with respect to two different reduction in
14 force exercises that took place at properties, right?

15 A. Yes.

16 Q. And that's in reference on the right as RIF and VIG are
17 two different reduction in force programs?

18 A. Yes. One was in Q4 2008 and one was in Q1 2009.

19 Q. So the RIF is in the fourth quarter of '08?

20 A. I think so. I can't recall the specific -- I mean, RIF
21 stands for reduction in force, clearly. VIG -- I have no idea
22 what that stands for.

23 Q. Okay. But VIG is in the first quarter of '09, correct?

24 A. It's one or the other. I'm sorry I'm --

25 Q. One of them --

1 A. One of them is Q4 and one of them is Q1 2009.

2 Q. Okay. And if we turn back to Section 9.1(b) --

3 (Pause)

4 Q. -- you'll agree with me that Section 9.1(b) provides for
5 the payment of severance for employees who -- for the period
6 from the closing up until December 31st, 2008, right?

7 A. It references the date December 31st, 2008, correct.

8 Q. So it doesn't apply to the reduction in force the
9 following year, does it?

10 A. I don't know what this applies to.

11 Q. Okay.

12 MR. HINE: Let's go back to the chart, please?

13 Q. Now, in any event, this severance payment, when that
14 severance payment is calculated, it's calculated in reference
15 to the severance program that was in place at Lehman before
16 these folks came over to Barclays, right?

17 A. Believe so, yes.

18 Q. Yes. Okay. But you have no real understanding, I think
19 you said -- or at your deposition, you have no real
20 understanding how this severance payment relates to 9.1(c) and
21 the obligations under 9.1(c) of the APA. Is that fair to say?

22 A. I have no understanding -- I had no understanding of what
23 9.1(c) obligates Barclays to do or not.

24 Q. Okay. And the same would be true of the severance
25 payment, the twenty-seven million and future severance

1 payments, right?

2 A. Sorry. I don't understand your question.

3 Q. Well, the next entry is twenty-seven million in severance
4 payments that had not been paid at the time you prepared this
5 chart, right?

6 A. Yes. The adjourned payroll hadn't as yet physically been
7 paid.

8 Q. Okay. And same question, you would not -- you have no
9 understanding of how that severance payment relates to the
10 obligations of 9.1(c) under the APA, correct?

11 A. No. I have no idea what --

12 Q. Okay.

13 A. -- had no idea what 9.1(c) obligates us to do.

14 Q. Okay. And if we wanted to compare these severance models
15 to Barclays' brief excerpt that we saw, I'd add up 238 and 27
16 and I would come to 265 million in total severance that
17 Barclays has paid, right?

18 A. That total is 265, yes.

19 Q. Right. So your numbers agree with the excerpt from the
20 brief that we looked at.

21 A. They appear to, yeah.

22 Q. Yes. Okay. Next is an item, a tax item. We've talked
23 about that. That's another payment to a tax authority,
24 correct? Nine billion?

25 A. I believe so, yes.

1 Q. Okay.

2 A. Or just to clarify, they may or may not have those yet
3 been paid. It depends on the timing of the actual payments to
4 the tax authority and, in fact, the value of that tax payment -
5 -

6 Q. Okay.

7 A. -- is -- depends on when the equity actually vests, I
8 believe.

9 Q. Okay. The next items is a fifty-three million dollar
10 position buyout investing over two years. Do you see that?

11 A. I do.

12 Q. And that relates to one individual trader who came from
13 Lehman to Barclays, right?

14 A. That's correct.

15 Q. Mr. Hoffman?

16 A. Correct.

17 Q. And Mr. Hoffman had a contract with Lehman. It's a
18 performance based contract where he would make x amount of
19 dollars depending on how well he traded, right?

20 A. That's reasonably fair to say.

21 Q. And Barclays assumed that contract so now he does that
22 work for Barclays, right?

23 A. Barclays issued him with a similar contract.

24 Q. Okay. And at the time you were preparing this chart, you
25 expected him to receive twenty million dollar tranches, one of

1 February of 2010 and one of February of 2011, correct?

2 A. That's correct. In fact, he's received the one on
3 February 2010.

4 Q. Okay. And he was going to get the balance -- the thirteen
5 million was --

6 A. He received that as well.

7 Q. He's received that as well?

8 A. Correct.

9 Q. And was paid on February 2010, correct?

10 A. It was delivered to him in whatever form outstanding
11 delivery parcel. But, yes, he received value to that effect.

12 Q. Okay. And in connection with this assuming this contract,
13 Barclays retained the right to reduce these amounts if he
14 traded poorly, correct?

15 A. In general, yes.

16 Q. So if he accumulated a lot of losses in his trading,
17 Barclays could reduce those twenty million dollars payment by,
18 I believe you testified, up to ten million dollars, correct?

19 A. That's correct.

20 Q. So at least in part, you would agree that Barclays'
21 willingness to pay that fifty-three million dollars depended on
22 his performance after he went to Barclays, correct?

23 A. We committed to this fifty-three million dollars
24 contractually to pay to Mr. Hoffman. Delivery thereof was
25 contingent on -- delivery of a portion thereof was contingent

1 on future performance.

2 Q. So ten million dollars on two different tranches, at least
3 a substantial portion of it, is contingent on how well he
4 performs after he moves to Barclays, isn't that right?

5 A. Those -- the twenty million tranches were subject to that
6 reduction under the contract, yes.

7 Q. Right. So that's --

8 A. Well, as I've stated, he's received the first twenty.
9 He's received the thirteen. And in fact, he's on track to
10 receive --

11 Q. Okay. That wasn't my question, Mr. Exall.

12 A. I'm just giving --

13 Q. But the question is Barclays assumed that contract.
14 Barclays' willingness to pay the fifty-three million dollars in
15 total was at least in substantial part dependant on how well he
16 traded when he went to Barclays, correct?

17 A. The fifty-three million dollars that we had committed to
18 were subject to -- a certain portion thereof was subject to
19 future performance.

20 Q. And it's also contingent on the fact that he has to stay
21 at Barclays till February of 2011, right?

22 A. I can't recall the exact interpretation of the contract
23 but if that's what it says then, in general, that's probably
24 the case.

25 Q. Well, let's --

1 A. For certain awards you receive in stock or something,
2 there are vesting conditions that are required. Some of them
3 require service. I can't recall exactly the specifics of Mr.
4 Hoffman's replacement contract.

5 Q. Okay. Let me direct your attention to page 135 of your
6 deposition.

7 A. Okay.

8 Q. I'm sorry. It's page 136. I apologize.

9 A. Okay.

10 Q. Starting at line 9, we're talking about Mr. Hoffman's
11 arrangement. The question is:

12 "Barclays' willingness to pay that is contingent at least
13 in substantial part on how well he performs for Barclays
14 thereafter, correct?"

15 "A. That is correct as well as Mr. Hoffman being in employment
16 with Barclays at the time."

17 Is that the testimony you gave at your deposition?

18 MR. BOIES: Your Honor, for context, could we have the
19 next question and answer, please?

20 THE COURT: Let's do that.

21 MR. HINE: Sure, Your Honor.

22 Q. The following question says:

23 "Okay. So he has to stay an employee at Barclays at least
24 through the third payment?"

25 "A. I don't know that for certain. Again, I can't interpret

1 the specific leaving clauses or termination clauses under his
2 agreement. But in general, that's, you know, I would say, it's
3 based on future time served criteria as well as trading
4 performance."

5 That was your testimony --

6 A. That's what I said.

7 Q. -- at your deposition, right?

8 A. That's what I said.

9 Q. And that's still a true statement?

10 A. I believe so.

11 Q. Okay. Let's go back -- refer back to paragraph 9.1(c)
12 once more.

13 (Pause)

14 Q. You'll see in that paragraph, about the seventh or eighth
15 line down, Mr. Exall, it says, "Such annual bonuses shall be
16 awarded on or before March 15th, 2009." You see that?

17 A. That's what it says.

18 Q. You would agree with me that the payments Mr. Hoffman
19 received were well after March 15th, 2009, is that right?

20 A. Which payments?

21 Q. The payments that he was to receive in February of 2010
22 and February of 2011.

23 A. He received a contract for March 15th, 2009 and we
24 stipulated Barclays' obligations under that contract.

25 Q. Right. But his payments he didn't receive until February

1 of 2010 or February of 2011, correct?

2 A. He certainly didn't receive certain payments until that
3 time. But it's -- again, I don't really know what this clause
4 means, but it does say "shall be awarded".

5 Q. Yes.

6 A. And he was given a contract with those terms inside it.

7 Q. He didn't get the money until February of 2010, is that
8 right?

9 A. In certain instances, yes.

10 Q. As to the ones we were just talking about, right?

11 A. That's correct, although I would go on to say that certain
12 individuals -- well, under normal stock programs they're
13 given -- people are given awards of stock. They don't
14 necessarily receive the cash value before the 15th of March
15 2009. But they may well have received the actual reward value
16 in a letter.

17 Q. Okay. Can we go back to your chart? And just one point
18 of clarity. Mr. Hoffman, in addition to this fifty-three
19 million dollar entry, he also received a bonus that falls
20 within the 1.529 number further up, correct?

21 A. That's correct.

22 Q. So he received both a bonus within that category of
23 payments and a separate contractual performance based contract,
24 right?

25 A. He received an amount embodied in the 1.529 number. And

1 he received awards for the value of fifty-three million dollars
2 as stipulated on the schedule.

3 Q. Okay. And following that fifty-three number, you'll see
4 there's a payroll tax associated with his payments, is that
5 right?

6 A. I believe so, yeah.

7 Q. Okay. And then the last large item is ISP awards. Do you
8 see that? Fifty-six million?

9 A. Yes.

10 Q. Now, as I understand it, those are shares of stock, the
11 stock bonuses that Barclays paid to employees to compensate
12 them for the fact that they did not receive their normal bonus
13 in March but rather received it in May, is that right?

14 A. I wouldn't categorize it that way, no.

15 Q. Okay. Well, let me try to break it down. The normal
16 practice at Barclays would be to pay stock awards in March,
17 correct?

18 A. The normal practice for Barclays is to make awards to
19 individuals and communicate their compensation in late
20 February, make cash payments and then make stock awards related
21 to those in March having purchased the stock on an open market.

22 Q. Okay. And for some reason, 2009 -- those awards were paid
23 in May instead of March, right?

24 A. I do recall there was a delay.

25 Q. Okay. And this is to compensate the recipients of those

1 awards for the fact that Barclays stopped appreciating the
2 value in that interim period, right?

3 A. That's correct. The amount of stock units that they would
4 have received in May would have been substantially lower than
5 the amount of stock units they would have received in March.
6 In March, people were told the dollar value of the awards they
7 were going to get in stock. But they would have received a
8 substantially higher number of units in March.

9 Q. Right.

10 A. In May, given the sheer class depreciation, they would
11 receive substantially fewer stock units. Consequently, this
12 award is directly related to the original value of the stock
13 awarded and it's to compensate them in part for the loss of
14 value in the sense that they would have gotten fewer stock
15 units.

16 Q. I understand it's related to their original awards but
17 it's --

18 A. It's directly related to the original awards.

19 Q. -- it's payment to compensate them for the fact that
20 Barclays' normal procedures weren't followed and they were paid
21 several months later, isn't that right?

22 A. No. People got awards of value in March as a normal
23 course of business.

24 Q. Right.

25 A. They were not told the amount of stock units they

1 received until later.

2 Q. Right.

3 A. And this is to compensate them for the fact that they, in
4 May, doing a mathematical calculation based on the strike price
5 that we would have received in having hedged or purchased the
6 shares on the market, they would have received fewer shares
7 than they otherwise would have received. It's directly related
8 to the value of the stock awards made at the time.

9 Q. But it's due to the -- it's paid due to the fact that
10 their normal process wasn't followed that year, right?

11 A. For various reasons, yes.

12 Q. Right. Okay.

13 MR. HINE: Your Honor, I have nothing further.

14 THE COURT: Do you have any redirect?

15 MR. BOIES: Excuse me, Your Honor?

16 THE COURT: Do you have any redirect?

17 MR. BOIES: I do, Your Honor.

18 THE COURT: About how long do you think you might be,
19 Mr. Boies?

20 MR. BOIES: I would say certainly much less than the
21 cross. I would say maybe thirty, forty minutes. I think we
22 should take a break at this point. It's ten after 11. Let's
23 resume at twenty after 11.

24 MR. BOIES: Thank you, Your Honor.

25 (Recess from 11:10 a.m. until 11:29 a.m.)

1 THE COURT: Be seated, please. Please proceed, Mr.
2 Boies.

3 MR. BOIES: Thank you, Your Honor.

4 REDIRECT EXAMINATION

5 BY MR. BOIES:

6 Q. Good morning, Mr. Exall.

7 A. Good morning.

8 Q. Counsel asked you a number of questions about a
9 conversation that you had with Mr. Guarnuccio. And he took you
10 through the fact that you were not present even in New York
11 when the APA was signed. Is that correct?

12 A. I wasn't in New York till the 22nd -- or 21st of
13 September.

14 Q. Of September?

15 A. Yeah. I don't know when the APA was actually signed.

16 Q. And you spoke to Mr. Guarnuccio shortly after arriving in
17 New York in September of 2008, is that correct?

18 A. I recall it being at or around the time. I can't be
19 precise about the date. I don't -- I couldn't find it in my
20 diary and I have no notes of the meeting.

21 Q. You don't have any reason to doubt Mr. Guarnuccio's
22 statement that it was in September of 2008, correct?

23 A. No.

24 Q. And at the time you spoke to Mr. Guarnuccio, this was when
25 you were just beginning to examine the bonus and severance

1 issues, is that correct?

2 A. Yes. This was at the beginning of my work associated with
3 the sale, yes.

4 Q. Now, Mr. -- counsel gave you a copy of Movants' Exhibit 2.
5 And that's in the book that they gave you. This is the
6 schedule that is initialed by Mr. Berkenfeld?

7 A. Yes.

8 Q. And is there any place on this schedule that references
9 bonus payments?

10 A. Not that I can see.

11 Q. There is a reference to comp, is that correct?

12 A. Correct.

13 Q. And you understand that to mean compensation, correct?

14 A. That would be my interpretation of that.

15 Q. And that shows a total for compensation of two billion
16 dollars, is that correct?

17 A. That's what it seems to show.

18 Q. And as you use the terms, "comp" and "compensation" as an
19 HR person, does that include severance as well as bonuses?

20 A. Absolutely. Compensation encompasses all forms of award
21 and compensation for services rendered including bonus,
22 severance, annual, long term incentive awards if necessary,
23 stock awards, benefits, monthly salary, all sorts of
24 compensation.

25 Q. Now you were shown some materials from our brief in the

1 trial record. I'd like to show you a couple of pieces also.

2 Do you happen to know who Mr. McDade is?

3 A. I don't know him personally but I know who he is.

4 Q. And he was the lead negotiator for Lehman in this sales
5 transaction. Were you aware of that?

6 A. I have heard that.

7 Q. Let me show you some testimony that Mr. McDade gave at
8 this trial, the official trial transcript of April 26th, 2010
9 at page 160. And this -- in particular, I want to go to line
10 24 and the question that carries over to the next page. And
11 I'd like you to look at this on the screen:

12 "Q. The other part of that question had to do with
13 compensation, sir.

14 A. Right. Barclays also assumed a two billion dollar
15 compensation liability with respect to the combination of the
16 employees' bonus process and the severance process."

17 Do you see that?

18 A. I do.

19 Q. Did you come across anything in your work that was
20 inconsistent with that?

21 A. Well, I believe so.

22 Q. Now, going back just for a moment to Movants' Exhibit 2,
23 it's initialed up in the right-hand corner. Do you know whose
24 initials those are?

25 A. No, I don't.

1 Q. Didn't anyone ever tell you that was Mr. Berkenfeld? Yes
2 or no?

3 A. Not during the process.

4 Q. Okay.

5 A. I happened to be --

6 Q. There's some testimony in the record that this was Mr.
7 Berkenfeld's initials.

8 A. Okay.

9 Q. And I ask you to assume that just for the moment. And let
10 me show you -- and the cure and comp number totals 4.2 billion
11 dollars, correct? 4.25 billion dollars?

12 A. That's correct.

13 Q. Let me show from the official trial transcript, June 21st,
14 2010. This is Mr. Marsal's testimony at lines 9 through 14 of
15 page 45:

16 "Q. Was it your understanding in October of 2008 that the
17 assumed cure liability that is listed here and the assumed
18 severance liability that was listed here together added up to
19 4.2 billion dollars?

20 A. That was my assumption based on the conversation with
21 Steven Berkenfeld, yes."

22 And did you find anything in your work that was
23 inconsistent with the inclusion of severance in that 4.2
24 billion dollars?

25 A. If severance -- well, no. No, I didn't. If these are the

1 references you're making then, no, I don't see anything
2 inconsistent with that.

3 Q. Let me ask you to look at page 38 of your deposition. And
4 you will recall that counsel asked you some questions about
5 that and directed your attention to the testimony at the top of
6 the page. And you said in your answer, yes, you had testified
7 as he indicated at the top but there was also some testimony at
8 the bottom that you thought was relevant?

9 A. Yes.

10 Q. And I'd like to now give you a chance to look at that
11 portion at the bottom beginning at line 17 to 24:

12 "Q. What did Mr. Clarkson (sic) tell you about that schedule?

13 "A. I don't recall what he told me about it. I asked for a
14 copy of it as part of my own reading of the relevant sections
15 of the APA."

16 And did you give that testimony also at the time?

17 A. Yes, I did.

18 Q. Let me ask you to look next at Movants' Exhibit 801 that
19 is in the book that counsel gave you. And you'll recall that
20 counsel asked you about the e-mail at the bottom of the page
21 which was from James Walker to you with a copy to Gary Romaine
22 dated November 3, 2008.

23 A. Yes.

24 Q. Do you recall that? And where he is requesting a copy of
25 the schedule that I think we've identified as Movants' Exhibit

1 2. And he says that -- or James says that there is a request
2 for a copy of the schedule that shows the two billion bonus
3 liability to Lehman folks. Do you recall that?

4 A. I see that there.

5 Q. Now when you reply to that, you don't use the term
6 "bonus", correct?

7 A. No, I didn't.

8 Q. In fact, when you replied to that, which is the middle e-
9 mail on the same exhibit, you say "Here is a scanned copy. You
10 will see the two billion dollars described as 'comp'." Do you
11 see that?

12 A. I do.

13 Q. And why did you do that?

14 A. I wanted to be precise about what I saw in the schedules
15 that have been given to me from Finance in relation to
16 Clause -- Article 9. And I'm very careful, generally, to use
17 precise terms. I realize that there is oftentimes confusion
18 when dealing with noncomp professionals. For example, in my
19 day-to-day, I deal with finance people all the time. They'll
20 use colloquialisms. And in the comp world, certain things mean
21 certain things to different people. So I try to be as precise
22 as I can when answering the question.

23 Q. Let me ask you to look next at Movants' Exhibit 91 which
24 was another exhibit that counsel showed you.

25 A. Yes.

1 Q. And you said in response to a couple of questions that the
2 1.4 billion dollar reference number was believed this time to
3 be insufficient. And I'd like to give you a chance to explain
4 what you meant by that.

5 A. The 1.4 billion dollars was given to me as a reference
6 point for the chart on the first page of this attached
7 document, summary report. If you turn to the second page, we
8 are looking at sensitivity analysis around that number. And
9 what we were trying to understand is with that reference point
10 and the guaranteed contracts that had been written and issued
11 to people at the time, what would the impact be on the residual
12 population that are not being guaranteed at that time.

13 Our target was to deliver in an aggregate for those people
14 without guarantees sixty-five percent of their 2007 total bonus
15 in 2008. And the sensitivity analysis that we performed at
16 this time almost from day 1 indicated that the residual amount
17 available for those nonguaranteed people was at least 270
18 million dollars short on the model basis. And if you adjust it
19 for people that may have received a zero bonus in 2007 and it
20 should be normalized in the normal course of events, you could
21 add another seventy-five to a hundred million dollars on top of
22 that.

23 So at this time, we were realizing that the 1.4 billion
24 dollar reference point was at least -- was anywhere between, on
25 a model basis, 270 and 370 million dollars short.

1 Now this is a bonus model only. It excluded, as you see
2 on the front page, severances that may or may not be payable to
3 eligible employees as part of the redundancy program.

4 Q. Now, in that connection, I'd like to ask you to look at
5 Movants' Exhibit Trial Exhibit 145, which you were also asked
6 about. And in particular, go on to the second page and at the
7 bottom, under "Strawman Approaches", one of the strawman
8 approaches that you identified is to try to manage within the
9 overall 1.4 billion dollar number. Do you see that?

10 A. I see that.

11 Q. And you were asked about that. And there are a list of
12 risks or disadvantages to this. And there are several. And
13 counsel asked you about the very last one which was spending
14 more than one billion dollars is "dilutive to current negative
15 goodwill calculation". Do you see that?

16 A. More than 1.4 billion.

17 Q. Yes. And what I'd like to do is ask you about the very
18 first disadvantage of the several that are listed here, not the
19 last one, which is "contrary to original principles". And can
20 you explain what you meant by that?

21 A. What I meant by that was there was an original plan to
22 issue guarantee bonus contracts to the top 175 to 200 people.
23 And we were going to go beyond that estimate. We were going to
24 issue guarantee bonus contracts to more than that given the
25 substantial pressures that we were under to retain staff and

1 solidify the franchise. I think if you continue on under those
2 disadvantages to the second last one, we were referencing the
3 fact that a finite pool, which is the 1.4 billion dollar
4 reference point, would mean a furtherance of substantial
5 squeeze on nonguaranteed people and lead to flat risk which is
6 what we were seeing at the time. And I think at this time, we
7 realized that 1.4 billion dollars was just not going to be
8 sufficient if we were going to address these concerns of the
9 business.

10 Q. Let me ask you -- incidentally, before I go on to the next
11 exhibit, in addition to the guaranteed -- the people you were
12 going to guarantee the bonuses to, was it the plan to give
13 bonuses to additional people?

14 A. Yes. People that were not issued guaranteed contracts
15 were eligible for compensation.

16 Q. And from the beginning, was it intended that some amount
17 of money would be spent on bonuses for pre-acquisition services
18 for former Lehman employees who were not given guarantee
19 contracts?

20 A. That's correct. The original targets, rules of the road
21 for wont of a colloquialism that we use, was to try and deliver
22 an aggregate to those people an amount equivalent to sixty-five
23 percent of their 2007 bonus.

24 Q. Okay. Now let me go on to Movants' Trial Exhibit 107
25 which is another version of an exhibit that I had used with you

1 during my examination yesterday. And in this connection,
2 counsel asked you a number of questions about taxes and payment
3 of taxes to tax authorities. Do you recall that generally?

4 A. Yes.

5 Q. Now, typically, if you pay a bonus to an individual, do
6 the taxing authorities require you to withhold a certain amount
7 of that bonus and pay it to the tax authorities?

8 A. In most tax jurisdictions, that's correct.

9 Q. And when you do that, is your belief that when you pay it
10 to the tax authorities, you're paying it on behalf of the
11 employee?

12 A. It will be their liability to the tax amount in that
13 jurisdiction, correct. And the employer is effectively acting
14 as a collection agent for --

15 Q. And do you include the amount of the withholding that
16 you're paying to the tax authorities as part of what you
17 ordinarily consider to be the bonus that is being paid to the
18 individual?

19 A. Yes. That's the value that would be drawn to or awarded
20 to the individual, the gross number.

21 MR. BOIES: Your Honor, I have no more questions.

22 THE COURT: Is there anything more?

23 MR. HINE: No questions, Your Honor.

24 THE COURT: You're excused. Thank you.

25 THE WITNESS: Thank you, Your Honor.

1 MR. BOIES: Our next witness, Your Honor, is Mr.

2 Rosen. We call Mr. Rosen to the stand.

3 THE COURT: Please raise your right hand, sir.

4 (Witness duly sworn)

5 THE COURT: Be seated, please.

6 MR. BOIES: We will hand out binders and documents I'm
7 going to be using. And we'll collect the binder that's up
8 there on the witness stand.

9 DIRECT EXAMINATION

10 BY MR. BOIES:

11 Q. Good morning, Mr. Rosen.

12 A. Good morning, Mr. Boies.

13 (Pause)

14 A. Thank you.

15 Q. You are a partner with the firm of Cleary Gottlieb,
16 correct?

17 A. Yes, that's correct.

18 Q. And how long have you been a partner at Cleary Gottlieb?

19 A. Approximately twenty years.

20 Q. And do you have a specialization in your practice?

21 A. Yes. I specialize in derivatives and in securities
22 regulation.

23 Q. And how long have you specialized in derivatives?

24 A. More than twenty-five years. Thank you.

25 Q. And do I understand correctly that you are the coordinator

1 of Cleary Gottlieb's financial products and markets practice
2 group?

3 A. Yes, that's correct.

4 Q. Now there is a Securities Industry and Financial Markets
5 Association. Are you familiar with that?

6 A. Yes, I am.

7 Q. And do you play any role with respect to that association?

8 A. Yes. I have been the regular outside counsel to the
9 derivatives committee and have advised and testified before
10 Congress for that trade association on a number of occasions.

11 Q. Do you play any role with respect to the Securities
12 Industry Association?

13 A. The Securities Industry and Financial Markets Association
14 has succeeded to the Securities Industry Association which I
15 similarly represented before.

16 Q. And there is also a Futures Industry Association, is that
17 correct?

18 A. That is correct.

19 Q. And do you play any role with respect to the Futures
20 Industry Association?

21 A. I have advised the Futures Industry Association on
22 derivatives regulation. And I am also on the board of
23 directors of the Futures Industry Association.

24 Q. With respect to the International Swaps and Derivatives
25 Association, do you play any role with respect to that --

1 A. I have --

2 Q. -- organization?

3 A. -- advised and on occasion testified before Congress for
4 the International Swaps and Derivatives Association and I am on
5 their regulatory advisory committee in the United States.

6 Q. With respect to the Bond Market Association, is that an
7 association that you have any connection with?

8 A. That is also a Securities Industry Association that was
9 superseded by the Securities Industry and Financial Markets
10 Association. And while it existed, I similarly advised that
11 trade association.

12 Q. I want to direct your attention to the period of September
13 of 2008. And you were involved in the Barclays/Lehman
14 transaction, correct, sir?

15 A. Yes, that's correct.

16 Q. When did you become involved in that transaction?

17 A. I became involved, my recollection is, in the beginning of
18 the week leading up to the sale hearing.

19 Q. And who did you represent?

20 A. I was representing Barclays. I was not a member of the
21 deal -- original deal negotiation team. But I was an adjunct
22 to it for the purpose initially of addressing certain
23 regulatory issues that were presented by the transaction.

24 Q. And did those issues include issues related to the
25 derivatives business or the exchange traded derivatives

1 business?

2 A. It did. And they involved -- they evolved to observe
3 quite a lot of my attention, particularly, at the time of the
4 sale hearing and over the weekend following that.

5 Q. And were you also at some point involved in issues
6 relating to JPMorgan?

7 A. Yes.

8 Q. Did you have any involvement in the preparation of the
9 original APA?

10 A. I wasn't a part of the deal team negotiating it but I had
11 been asked by my partners to prepare a set of conditions that
12 related to regulatory requirements which I'm happy to elaborate
13 if you'd like.

14 Q. Would you just summarize your --

15 A. Just very briefly. Lehman Brothers operated under a
16 particular regulatory regime with the SEC which entitled it to
17 certain favorable capital treatment. Barclays was not
18 operating under that same regime. And so, we needed certain
19 arrangements with the SEC to agree that with the combined
20 entity, they could continue to operate at least the Lehman
21 portion of the business if not the entire business under the
22 new regime. And since Lehman had been subject to consolidated
23 supervision by the SEC but Barclays' local consolidated
24 supervisor was the Federal Reserve, as part of the regime, it's
25 necessary for the holding company of the broker-dealer to be

1 subject to a consolidated supervisor. And we were seeking
2 confirmation that the SEC would permit the Fed to be the
3 consolidated supervisor. We ultimately received assurances
4 from the SEC along those lines.

5 Q. Now you're familiar with the so-called clarification
6 letter, correct?

7 A. Yes, I am.

8 Q. Did you have any involvement in the actual negotiation and
9 drafting of the clarification letter?

10 A. Specific provisions of it, I did.

11 Q. And could you identify those specific provisions?

12 A. I dealt with provisions that related to assets that were
13 in the 15c3-3 account. I had some involvement in provisions
14 that related to DTCC. And I had some involvement in provisions
15 relating to the treatment of exchange traded derivatives and a
16 margin that was associated with those exchange traded
17 derivatives.

18 Q. And did that include what has sometimes been referred to
19 in this trial as clearance box assets, any of those that you've
20 just identified?

21 A. There were provisions related to the provisions that I
22 worked on that included references to the clearance box assets,
23 yes.

24 Q. Let me turn to the exchange traded derivatives or
25 sometimes referred to in this trial as ETDs. And let me begin

1 by asking although you were not involved in negotiating the
2 APA, did you read it and were you familiar with its terms?

3 A. I did come to read it and develop some familiarity with
4 particular provisions that related to the clarification letter
5 issues that I was working on, yes.

6 Q. Let me ask you to look at Exhibit 1, which is the APA, and
7 it's at tab 2 of your book. And in particular, let me ask you
8 to look at page 2 where the APA defines the business that is
9 being defined -- that is being acquired by Barclays. And it
10 says that the "Business means the U.S. and Canadian investment
11 banking and capital markets businesses of Seller including the
12 fixed income and equities, cash trading brokerage, dealing,
13 trading and advisory businesses, investment banking operations
14 and LBI's business as a futures commission merchant." Do you
15 see that?

16 A. Yes, I do.

17 Q. And as you understood it at the time, were exchange traded
18 derivatives a part of that business?

19 A. Yes. They would have been a part of that business both as
20 part of the capital markets trading business of Lehman, its
21 brokerage business and as part of what is referred to at the
22 end as "LBI's business as a futures commission merchant" which
23 is a colloquial reference to being a broker in the futures
24 business which are listed exchange traded futures contracts.

25 Q. Let me now ask you to look at page 6 of the APA where

1 purchased assets are defined. And in particular, I want to
2 look at the very beginning where it says "Purchased Assets
3 means all of the assets of the Seller and its subsidiaries used
4 in connection with the business." Do you see that?

5 A. Yes, I do.

6 Q. And we've just defined what that business is. And would
7 ETD margin or the margin for the exchange traded derivatives be
8 assets of the seller used in connection with the business as
9 you understood it?

10 A. Yes. It would have been one of the most important assets
11 associated with the business if not the most important asset
12 associated with the business.

13 Q. Why is that?

14 A. The reason is that exchange traded derivatives are a form
15 of executory contract. They're a contract that create ongoing
16 future performance obligations with the possibility that
17 someone who has such a position might not fulfill their
18 obligations in the future. You can only maintain an exchange
19 traded derivatives position through a clearinghouse in an
20 account of a participant of a clearinghouse with arrangements
21 for the deposit or other commitment of a variety of different
22 forms of security or collateral, generally referred to as
23 credit support, to ensure that if someone doesn't pay their
24 obligations under the exchange traded derivatives going forward
25 that there will be assets available to ensure that the market -

1 - market participants in the clearing corporation doesn't incur
2 a loss. It's to maintain the financial integrity of those
3 markets. So you can't have a position in an exchange traded
4 derivative without having margin, a guarantied fund deposit,
5 various forms of arrangements to provide security or collateral
6 to the clearing corporation. And the clearing broker
7 occasionally requires their customers to provide equivalent
8 levels of that kind of credit and collateral to the clearing
9 broker so that the clearing broker is covered in terms of its
10 obligations to the clearing corporation.

11 Q. Now the APA says that purchased assets means all of the
12 assets of the seller used in connection with the business
13 excluding the excluded assets. It then gives some examples of
14 what is included. And I want to go through at least one of
15 those examples with you because of what you just said. And
16 that is paragraph -- subparagraph (b) where one of the examples
17 of included assets is "all deposits". Do you see that?

18 A. Yes, I do.

19 Q. And would exchange traded derivative margin, as you
20 understand it, be included in the ordinary course of the words
21 "deposits" as those are used in the industry?

22 A. Yes, but not only the margin. It would also be the
23 guaranty fund deposit. And I think if you look at the
24 documents that were provided by the OCC in connection with
25 those transactions, you will see that they refer specifically

1 to margin deposits and guaranty fund deposits. And these types
2 of deposits are precisely -- perform precisely the same
3 function as the enumerated deposits because, again, it's a
4 question of having a contractual arrangement whether it's a
5 lease or some other obligation to pay money going forward and
6 providing some form of security or collateral to ensure that
7 the party to whom the payment is owed is protected in the event
8 that there is a default.

9 Q. Now during the negotiations that you were aware of and
10 involved in in connection with the sale transaction, was it
11 apparent to you as to whether or not the parties were
12 specifically focusing on ETD margin as part of what was being
13 transferred to Barclays?

14 A. Yes, from the very beginning it was clear to me.

15 Q. And can you give me some examples of how that became clear
16 to you?

17 A. Well, in the sale order itself leading up to the sale
18 hearing, I received, forwarded from one of my partners, an e-
19 mail from the Options Clearing Corporation which is the U.S.
20 largest clearing corporation for securities options. And they
21 wanted to include language in the sale order to protect the
22 lien that they would have on the margin in the accounts of
23 Lehman that were being transferred to Barclays as part of the
24 APA because they were concerned that the provisions of the sale
25 order that would have relinquished the liens of third parties

1 with respect to the purchased assets might be read to affect
2 the liens that they would have with respect to the margin and
3 other assets that they would have held in accounts transferred
4 from Lehman to Barclays as part of the transaction.

5 Q. Now you referred to an e-mail. Let me ask you to look at
6 tab 27 in the book that you have in front of you.

7 A. I'm sorry, Mr. Boies. My binder goes up to 26 -- wait, I
8 may be wrong. Yes. I see it. I apologize.

9 Q. And I would ask you -- and this is Movants' Trial Exhibit
10 508. And I would ask you whether this is the e-mail that you
11 were referring to.

12 A. No. This is not the e-mail that I was referring to.

13 Q. Okay. This is a different e-mail --

14 A. Yes.

15 Q. -- which was also --

16 A. This was sent on the Sunday.

17 Q. Sent to you Sunday.

18 A. Yes.

19 Q. I'll get the right one. Let me try tab 3 which is
20 Barclays' Exhibit 220.

21 A. Yes. I recognize this.

22 Q. Is this the e-mail that you were referring to?

23 A. Yes. This is the e-mail. And what is included here is a
24 forwarding of an earlier e-mail to a number of individuals
25 including at Weil because after I had seen and reviewed the

1 language that they wanted to include which I thought was a
2 reasonable concern for them to seek to be addressed, I
3 suggested to them that they forward it on to the Lehman side.

4 Q. And this e-mail, the second page in the e-mail that is
5 September 19th, 2008 at 11:39 p.m., it talks about the
6 collateral that is being transferred from LBI accounts at OCC
7 to Barclays' accounts at OCC.

8 A. Yes. Positions and collateral, yes.

9 Q. And did anyone ever indicate to you that there was any
10 intention on Lehman's part not to transfer any of the ETD
11 margin or collateral?

12 A. That was never communicated to me at any time.

13 Q. And would there have been any reason for the OCC to have
14 this concern if the positions and collateral were not being
15 transferred to Barclays?

16 A. No. And similarly, if the transfers had been limited to
17 customer accounts and customer property, that would not have
18 been affected by the release of the lien and therefore wouldn't
19 have been a purchased asset. So this could only have been a
20 concern of theirs with respect to the proprietary portions of
21 the assets and positions in the account.

22 Q. Let me ask you to look at the document that is behind tab
23 8. This is Barclays' Exhibit 233.

24 A. Yes, sir.

25 Q. And this is a e-mail from James McDaniel to a number of

1 people dated September 20, 2008 at 12:45 p.m. Do you see that?

2 A. Yes.

3 Q. And did you get a copy of this?

4 A. I did get a copy of this, yes.

5 Q. And one of the things that is said and indeed the very
6 first thing that is said is "OCC is seeking to confirm its
7 understanding that the LBI accounts and all positions, cash and
8 securities collateral that are held by OCC in respect of those
9 accounts are intended to be transferred to Barclays and that
10 Barclays is assuming all obligations with respect to those
11 accounts." Do you see that?

12 A. I do see that.

13 Q. And was confirmation given to OCC that that was in fact
14 what was being done?

15 A. I believe I confirmed that with Jim McDaniel on the
16 telephone.

17 Q. Now --

18 A. This was -- the implementation of this was to be
19 effectuated by a transfer and assumption agreement copies of
20 which were provided to me and I understood also the trustee for
21 the first time on Friday.

22 Q. Now you mentioned the trustee. Could you go through who
23 the addressees of this e-mail are to the extent that you
24 recognize them?

25 A. There are a number of Weil Gotshal lawyers, Ronit

1 Berkovich, Shai Waisman, Rod Miller, Hague Generis (ph.). Also
2 included on this in addition to myself was Mr. Kobak at Hughes
3 Hubbard, Mr. Giddens at Hughes Hubbard, a fellow by the name of
4 Margolin at Hughes Hubbard. K. Caputo at SIPC, Shelly Hirshon
5 at Proskauer and a name I don't recognize of someone at DTCC.

6 Q. And you mentioned several representatives from Hughes
7 Hubbard. Who was Hughes Hubbard representing here?

8 A. My understanding is that Hughes Hubbard was representing
9 the trustee.

10 Q. And did anyone who received this e-mail, or anyone else
11 for that matter, ever say that OCC's understanding that all
12 positions, cash and securities collateral held by OCC was being
13 transferred to Barclays?

14 A. No. Quite the contrary. The actions of the participants
15 in the transaction were exactly the opposite. I was informed
16 sometime between Friday and Saturday that the transfer and
17 assumption agreement language implementing what is described
18 here was signed by the trustee and that the OCC had that
19 signature page. And they were looking to us also to execute
20 the transfer and assumption agreement.

21 Q. Let me ask you to look at another e-mail.

22 (Pause)

23 MR. BOIES: May I have just a moment, Your Honor?

24 THE COURT: Yes.

25 (Pause)

1 Q. Let me ask you to look at the e-mail that we looked at a
2 moment ago that's behind tab 3. And in particular, on the
3 second page, this is the e-mail that I mentioned earlier,
4 September 19th, 2008 at 11:39 p.m. -- or a.m. where there is a
5 request to insert into the sale order some language. Do you
6 see that?

7 A. Yes, I do.

8 Q. At the very bottom of the page, it says, "From and after
9 the closing date, all securities, cash, collateral and other
10 property transferred to accounts of the purchaser at OCC shall
11 be subject to all rights of OCC therein in accordance with the
12 bylaws and rules of OCC including, without limitation, the
13 security interest and setoff rights of OCC with respect
14 thereto." Do you see that?

15 A. Yes, I do.

16 Q. And was that information, in fact, included in the sale
17 order?

18 A. Yes, it was. My understanding is it was, yes.

19 Q. Now would this provision have had any rationale and made
20 any sense if Barclays was not getting the ETD margin?

21 A. No, I don't believe so. Certainly not the reference to
22 the securities, cash and collateral and other property
23 transferred to the accounts.

24 Q. Now, let me ask you to look next at tab 6 which is the
25 transfer and assumption agreement. And this is Barclays'

1 Exhibit number 3. And I want to direct your attention to the
2 first paragraph of what's described as being transferred and,
3 in particular, subparagraph (a) where it says "For good and
4 valuable consideration, the receipt and sufficiency of which
5 are hereby acknowledged, Lehman hereby assigns -- hereby sells,
6 assigns, transfers and sets over to Barclays without recourse
7 or without representation or warranty other than as expressly
8 provided herein all of Lehman's rights, title, interests,
9 powers, privileges, remedies, obligations and duties in, to,
10 under and in respect of the account as of the effective date
11 including with respect to (i) the clearing fund deposit; (ii) all
12 margin deposits held by OCC with respect to the account;
13 (iii) all settlement obligations with regard to the transactions
14 and cleared contracts; and (iv) all rights and obligations in
15 respect of exercises of option contracts and assignments of
16 such exercise." Do you see that?

17 A. I do.

18 Q. And did that include the ETD margin and collateral?

19 A. That would have included the ETD margin and collateral
20 Lehman Brothers guaranty clearing -- what they call a clearing
21 fund deposit. There are different terms of art used to refer
22 to these various forms of credit. But yes. And it would have
23 applied to all of their accounts which would have included
24 customer accounts, their proprietary accounts as well as the
25 margin deposits that secured obligations under those.

1 Q. Now let me ask you to turn to the last page of this, the
2 signature page. And it is signed on behalf of James W. Giddens
3 as trustee for Lehman Brothers Inc. Do you see that?

4 A. Yes, I do.

5 Q. And do you recognize who signed on behalf of the trustee?

6 A. It appears to be James Kobak.

7 Q. Now did you ever hear anything from Mr. Kobak or any
8 representative of the trustee that was inconsistent with your
9 understanding that LBI was transferring all of the exchange
10 traded derivative margin and collateral of whatever kind of
11 description?

12 A. Not at any time.

13 Q. Let me ask you to turn next to tab 8 in your book. This I
14 had showed you before. This is BCI 233.

15 A. Yes. I see it.

16 Q. And this was a -- an e-mail that Mr. McDaniel sent on
17 Saturday, September 20th, correct?

18 A. Yes.

19 Q. And we've already gone over that. But then if you turn to
20 tab 9, which is another e-mail from Mr. McDaniel the next day,
21 that is, Sunday, September 21, at 4:03 p.m., and this is on the
22 second page.

23 A. Yes.

24 Q. Paragraph number 2 says "Having heard nothing further from
25 you with respect to cash held by OCC in respect of the LBI

1 accounts and in accordance with the terms of the transfer and
2 purchase agreement, all such cash in the accounts will be
3 transferred to Barclays assuming that the transaction closes
4 this evening. Do you see that?

5 A. Yes. I do see that.

6 Q. And this again goes to Mr. Giddens and Mr. Kobak as well
7 as people at SIPC and elsewhere, correct?

8 A. That's correct.

9 Q. Now, did anyone ever say in response to this e-mail, or
10 otherwise, that the cash being held by OCC in respect to the
11 ETD margin accounts that have held for Lehman was not to be
12 transferred to Barclays?

13 A. No one indicated that the cash was not -- or any portion
14 of it or cash associated with any particular accounts or
15 account type. There was no question raised in communications
16 to which I was a party questioning that.

17 Q. Now let me ask you to turn to tab 10. This is an e-mail
18 that you wrote on Saturday, September 20th, following Mr.
19 McDaniel's e-mail of September 20th at 12:45 p.m. that is BCI
20 Exhibit 233, but obviously before Mr. McDaniel's Sunday
21 September 21st e-mail. And you write, "Jim" -- and that's
22 addressed to Mr. McDaniel, correct, sir?

23 A. Yes.

24 Q. -- "can you tell us more about the one billion dollars?
25 Is it excess margin?" Do you see that?

1 A. Yes, I do.

2 Q. And to whom do you send copies of this e-mail?

3 A. I replied to everybody that was on the e-mail that I had
4 originally received from Mr. McDaniel. So that would include
5 the lawyers from Weil Gotshal, Jim Kobak at Hughes Hubbard,
6 James Giddens and some others and Mr. Ken Caputo, I guess, of
7 SIPC.

8 Q. Was it clear, as you understood it, from the conversations
9 and communications between all of these people that all of the
10 ETD margin, including cash margin, including any excess margin
11 that might have existed, was being transferred to Barclays?

12 A. It was certainly my understanding. And no one raised any
13 question as to whether or not there was or should have been a
14 distinction between margin that was required and margin that
15 was excess.

16 Q. Now if you tried to make a distinction between margin that
17 was excess and margin that was not excess, would there have
18 been a practical way to do that?

19 A. It would have required a fairly extensive set of
20 provisions the most important of which is you cannot tell
21 whether there is excess in relation to an exchange traded
22 derivative really until the position is liquidated because the
23 risk is the risk of the holder of the account until the
24 position has been liquidated and all obligations extinguished
25 and you can see what is left at that time. But you can't know

1 that what is excess at 9:00 in the morning is going to be
2 excess at 11:00 in the morning. One could have addressed --
3 one could have negotiated provisions addressed to those issues
4 but the question was never raised.

5 Q. Let me, in connection with what you just said, ask you to
6 look at Barclays' Exhibit 236, which is tab 14. And as we
7 established a moment ago, you had written Mr. McDaniel. "Can
8 you tell us more about the one billion dollars? Is it excess
9 margin?" And this is referring to the OCC margin that Lehman
10 Brothers had with respect to its EDT positions. And Mr.
11 McDaniel responds to you also on September 20th at 1:15 p.m.:
12 "Based on market movements on Friday, a significant amount of
13 it may be excess. But OCC won't know until tomorrow. Also,
14 Friday's trades may use some of the cash." Do you see that?

15 A. Yes, I do.

16 Q. And does that illustrate what you were saying a moment ago
17 that while there might have been a significant amount of
18 excess, it was very hard to tell and you couldn't tell except
19 by taking into account a variety of trades over a period of
20 time?

21 A. Yes. At this point -- anything at this point of time
22 would have been a projection and was subject to change very
23 quickly. And in fact, we received some additional
24 communications which indicated just how variable it was.

25 Q. Indeed, in that connection, let me ask you to look at tab

1 15 which is from Mr. McDaniel to you the same day, Saturday,
2 September 20th at 3:52 p.m., just a few hours later in the
3 afternoon from the e-mail that we just looked at. And he
4 begins "Ed, just to be clear, from OCC's perspective, these are
5 the three major open issues that we see now." And number one
6 is "How much of the approximately one billion in cash that OCC
7 is holding as margin for LBI accounts is intended to be
8 transferred to Barclays at closing? And how much will cash
9 margin not transferred be replaced?" And he goes down at the
10 bottom to say, "While we have indicated that there may be some
11 release of excess margin collateral on Monday, Saturday morning
12 preliminary numbers actually showed a 5.1 million margin
13 deficit."

14 A. Correct.

15 Q. "So I would not look for any large release." Do you see
16 that?

17 A. Yes, I do.

18 Q. And so that's going from a one billion dollar perhaps
19 excess margin to a 5.1 million dollar margin deficit.

20 A. Yes, although he never indicated that the one billion was
21 entirely excess. I asked the question because ordinarily the
22 profit on ETDs is manifested in cash. So I was trying to
23 ascertain how much risk was associated with these accounts
24 going forward. This is what we were trying to nail down.

25 Q. At a minimum, there was no doubt that there could be

1 significant excess margin, correct?

2 A. There could be excess margin or the markets could open in
3 the morning and if Barclays had assumed responsibility for the
4 accounts, it could have a billion dollar margin deficit that it
5 had to make up. There was no way to know over the weekend.

6 Q. And either way, that was Barclays' risk and reward,
7 correct?

8 A. Yes. That was precisely what Barclays was assuming in
9 taking on these positions.

10 Q. If there was a deficit, Barclays was responsible for it,
11 correct?

12 A. Correct.

13 Q. If there was an excess, Barclays got the benefit of it.

14 A. That's correct.

15 Q. Let me ask you to look next at tab 16 which is Movants'
16 Exhibit 421.

17 A. Yes.

18 Q. And is this an e-mail that you also got a copy of?

19 A. Yes. I had -- partly as a result of the exchanges that I
20 had had with Jim McDaniel and Bill Navin, who was the general
21 counsel at OCC, I had asked him if he could provide some
22 further color on the status of the accounts. And he forwarded
23 to me and to others the information in this e-mail relating to
24 the Lehman accounts. These appear to have been projections of
25 what they felt the cash flows would be on Monday based on the

1 information that they then had.

2 Q. Now we've been talking about the OCC and the ETD positions
3 that Lehman had at OCC. There are other futures exchanges,
4 correct?

5 A. Yes. There are other futures clearinghouses and even
6 additional options clearinghouses in the United States and
7 outside the United States.

8 Q. And at the time that the sales agreement was being
9 negotiated, were you aware that other futures exchanges had
10 already liquidated or auctioned off LBI's ETD positions?

11 A. Yes. Well, I had heard second-hand that the Chicago
12 Mercantile Exchange had done that. And there was a perception
13 that the circumstances under which that liquidation occurred
14 dissipated very significant amounts of margins in excess of a
15 billion dollars.

16 Q. And the OCC was also threatening to liquidate Lehman's ETD
17 accounts if the deal with Barclays did not go through, is that
18 correct?

19 A. Yes, that's correct. There was an e-mail from Jim
20 McDaniel to me over the weekend saying that they were very
21 extremely concerned about the positions even knowing everything
22 that they knew themselves about the positions in the margin and
23 that if this deal was not consummated, they would liquidate the
24 accounts. And if they had done that, the accounts couldn't
25 have -- wouldn't have been transferred and likely a very

1 substantial, if not all of whatever value there was, one would
2 have to assume would have been dissipated as in the case of the
3 Chicago Mercantile Exchange. So we wanted to avoid that at all
4 costs.

5 So when I received that e-mail from Mr. McDaniel, I
6 immediately forwarded it to Steve Harback, who was the
7 president of SIPC at the time, and asked him to reach out and
8 try to persuade OCC to give us the time that we needed to work
9 through the issues because I certainly didn't see any obstacle
10 to our executing the transfer and assumption agreement. There
11 were just a number of brush fires that we needed to address
12 over the course of the weekend to get all of the arrangements
13 completed.

14 Q. And for the record, let me ask you to turn to tab 9, which
15 is Barclays' Exhibit 267 -- we've already looked at in a
16 different context. And in particular, to page 2, the e-mail
17 from Mr. McDaniel Sunday, September 21st at 4:03 p.m.,
18 paragraph 3 in which Mr. McDaniel writes: "If the transaction
19 does not close tonight, OCC would need to immediately liquidate
20 and close out the LBI accounts and is preparing to do so.

21 These preparations are a precautionary measure that OCC does
22 not expect to have to use." Do you see that?

23 A. Yes, I do. I would say that they were operating under a
24 hair trigger.

25 Q. Yes. And that was at 4:03 p.m. And let me --

1 A. Let me just add that --

2 Q. Yes.

3 A. I mean, we shared their concern notwithstanding the fact
4 that we had received an indication that the preliminary numbers
5 were -- indicated that money was coming in to the account
6 because we didn't know what was going to happen Sunday night.
7 If Asia had opened and there was a report that the Lehman deal
8 that was approved by the Court on Friday had not consummated,
9 we had no idea what effect that might have on the market and
10 the market turmoil. If the market had moved against the
11 positions that were in the accounts that could have been
12 completely eliminated even before we got to close on Monday.
13 These things -- events move very, very quickly. And for these
14 kinds of numbers to be transmitted over a weekend, not an open
15 business cycle, suggested that in an active business cycle in
16 which the market was moving unfavorably or with great
17 volatility, these numbers could change significantly and in
18 amounts much larger than this potentially.

19 What this told us was not how favorable the market was but
20 how significant the potential level of market exposure was that
21 was associated with the positions in the accounts that Lehman
22 was transferring to Barclays.

23 Q. And indeed, later that day on Sunday at 4:37 p.m., on the
24 first page of Exhibit 267, Mr. McDaniel in an e-mail wrote to
25 you and the trustee representatives and others that although

1 they expected that the transaction would take place, "However,
2 OCC cannot allow the positions to remain in place if no
3 transaction is concluded tonight because OCC will then be
4 exposed to loss if the market moves against LBI's position."

5 Do you see that?

6 A. Yes.

7 Q. And you believed that that was, in fact, OCC's position,
8 correct?

9 A. Yes, I did. I had no reason to doubt that they would act
10 in that manner.

11 Q. Now, let me turn to the clarification letter. And in the
12 clarification letter, the clarification letter specifically
13 addresses the issue of EDT margin, correct?

14 A. It does.

15 Q. And let me try to find that in this volume.

16 THE COURT: Mr. Boies, while you're in the process of
17 looking, but without seeking in any way to interfere with the
18 process of finding the document, I just wanted to inquire as to
19 approximately how long you think you're going to be with the
20 witness on direct at this point?

21 MR. BOIES: I think probably more than half an hour
22 certainly.

23 THE COURT: If you're going to be more than half an
24 hour, why don't we use the lunch break for you to find that
25 document?

1 MR. BOIES: Thank you, Your Honor.

2 THE COURT: And we'll return at 2:00.

3 MR. BOIES: Thank you very much, Your Honor.

4 THE COURT: Okay. We're adjourned till then.

5 (Recess from 12:31:39 p.m. until 2:02 p.m.)

6 THE COURT: Please be seated. And, Mr. Boies, please
7 continue.

8 MR. BOIES: Thank you, Your Honor.

9 RESUME DIRECT EXAMINATION

10 BY MR. BOIES:

11 Q. Mr. Rosen, would you turn to tab 13 of your binder, which
12 is Barclays Exhibit 5? And this is the clarification letter,
13 correct?

14 A. Yes.

15 Q. And I'd like you to look at the bottom of page 1, when
16 it's talking about what the purchased assets include. And if
17 you turn over to the top of the second page, subsection C; do
18 you see that?

19 A. Yes.

20 Q. And there it says that the purchased assets include,
21 quote, "exchange-traded derivatives (and any property that may
22 be held to secure obligations under such derivatives)"; do you
23 see that?

24 A. Yes, I do.

25 Q. Did you have any role in adding that particular language

1 to the clarification letter?

2 A. I did.

3 Q. And what was that role?

4 A. I believe I drafted that parenthetical --

5 Q. And --

6 A. -- "and any property that may be held to secure
7 obligations under such derivatives".

8 Q. And did you furnish that to Weil Gotshal for Weil
9 Gotshal's consideration?

10 A. Yes, through one of my partners who had been involved in
11 the ongoing exchanges with Weil on the negotiation of the
12 documentation.

13 Q. And did Weil Gotshal accept that language as reflecting
14 the parties' intent?

15 A. Yes. Weil Gotshal took the language and included it in
16 the next draft that was circulated and which ultimately became
17 the executed version of the agreement. They were controlling
18 the documents. They were processing the clarification letter
19 on their computers.

20 Q. And did anyone ever object to that language before the
21 agreement was signed?

22 A. No. No one objected to the language.

23 Q. And did anyone object to that language before the
24 agreement was closed -- before the transaction closed?

25 A. No.

1 Q. Did anyone object to that language after it was closed, at
2 any time in the month of September or October of 2008?

3 A. It -- to my knowledge, no. At some point, there -- I
4 became aware, although I wasn't a central participant in the
5 ongoing developments after the closing, that there were some
6 questions that were being raised about the clarification in
7 relation to this subject. But no one, either leading up to the
8 execution of the documents or in the immediate aftermath of the
9 closing, to my knowledge, raised any objections.

10 Q. And did anyone come back to court in September or October
11 of 2008 and say that there was any disagreement with this
12 language?

13 A. Not to my knowledge, no.

14 Q. Prior to the time that this language had been -- this
15 particular language had been added, there was other language
16 that dealt -- or at least covered exchange-traded derivatives,
17 although perhaps not as -- with the same degree of specificity
18 as this language, correct?

19 A. Yes, that is correct.

20 Q. Let me ask you to look at tab 17, and this Barclays
21 Exhibit 249. And this is a draft of the clarification letter
22 as of September 20th, which is Saturday, at 11:13 p.m.,
23 correct?

24 A. I believe so, yes.

25 Q. And I direct your attention to subparagraph 1(d) on page 2

1 of the letter.

2 A. Yes.

3 Q. And if you go to Roman (i) -- (ii) in the middle of that
4 subparagraph, it is listing assets that are not excluded, that
5 is, assets that are included as purchased assets, correct?

6 A. Yes, although in a provision that is a -- an exception to
7 the exception.

8 Q. Yes. But the effect of the exception to the exception --

9 A. Yes.

10 Q. -- is to make what is being listed here included assets?

11 A. Correct.

12 Q. And it says "cash, cash equivalents, bank deposits or
13 similar cash items maintained (A) by or on behalf of LBI,
14 pursuant to Rule 15c3-3 of the Securities Exchange Act of 1934
15 or otherwise, or by or on behalf of any clearing agency or
16 clearing organization to collateralize, guaranty, secure
17 (whether as margin, guaranty fund, deposit or in any other
18 form) the obligations of LBI or any other person in an account
19 maintained by or on behalf of LBI and for which Purchaser shall
20 become responsible as of the Closing". You see that?

21 A. Yes.

22 Q. Did anyone object to that language on the grounds that it
23 included margin for exchange-traded derivatives?

24 A. No.

25 Q. Now, there came a time when that particular language was

1 removed, correct?

2 A. That is correct, yes.

3 Q. And what was the reason why it was removed?

4 A. Well, this language was included, I believe, in the next
5 draft, but the following draft followed two developments: One
6 was the resolution of the DTCC accounts of Lehman Brothers, and
7 the other issue related to the disposition of certain
8 securities in the 15c3-3 account that Lehman maintained. Those
9 issues had evolved from their treatment under this clause (ii),
10 which also happened to be broad enough to apply to exchange-
11 traded derivatives.

12 So in the next draft that we got back, the entirety of
13 this clause (ii) came out and in that draft there were other
14 provisions dealing specifically with the 15c3-3 account and
15 then, separately, provisions dealing with the resolution of the
16 DTCC accounts.

17 Q. And it was in response to that that you proposed the
18 language that was actually finally included in the executed
19 clarification letter?

20 A. Yes. When I saw the language and read it, I realized that
21 taking out the entirety of clause (ii) did more than was
22 addressed by the other provisions. So I had added the language
23 in the parenthetical back in. And at the time, I said to
24 myself, 'Well, you know, why deal with this as an exclusion to
25 an exclusion. We are talking about the exchange-traded

1 derivatives up above as purchased assets, so we might as well
2 just put it in directly as clearly and concisely and -- as we
3 could, and not use any language that might be regarded as
4 overly broad or dealing with other subjects.'

5 Q. Now, you mentioned that the language in 1(d)(ii) that I
6 was directing your attention to in the Saturday, September 20th
7 11:13 p.m. draft was included in subsequent drafts. And let me
8 ask you to look at tab 11, Barclays Exhibit 270. This is an
9 e-mail and attached draft of the clarification letter dated
10 Sunday, September 21st at 7:54 p.m., correct?

11 A. That's correct.

12 Q. And that includes a draft that continues to have the same
13 language basically as the 1(d)(ii) language that we were
14 looking at, correct?

15 A. That is correct.

16 Q. They have corrected the typo of taking out the (A) that
17 had existed before without a (B). But in terms of the
18 broadness of the language, including exchange-traded
19 derivatives, that still existed, correct?

20 A. Yes, that is correct.

21 Q. And the e-mail that is attached, from Weil Gotshal, that
22 goes to all of the relevant participants, including
23 representatives of the trustee and others, says "Attached
24 please find the most recent version of the so-called
25 clarification letter. The portions highlighted in yellow

1 concern the points which depend on the resolution of the
2 current discussions. Otherwise, we reviewed the text of the
3 letter with Cleary this morning, and this draft reflects
4 Cleary's comments. And apart from a few possible incidental
5 points where they have not yet signed off on the wording
6 changes made in response to their comments, I do not expect the
7 letter to change." Do you see that?

8 A. Yes.

9 Q. And with respect to the matters that were highlighted in
10 yellow, did those relate to anything concerning the exchange-
11 traded derivatives?

12 A. Not to my knowledge, although I should say that I did not
13 see this e-mail at the time. This e-mail only came to my
14 attention later.

15 Q. Now, going back to the language in the actual
16 clarification letter, tab 13, Barclays Exhibit 5, where it says
17 purchased assets included exchange-traded derivatives and any
18 property that may be held to secure obligations under such
19 derivatives, does that language -- or could that language apply
20 only to customer accounts or a customer margin?

21 A. No.

22 Q. Why not?

23 A. There's no such limitation. It's all exchange-traded
24 derivatives. It doesn't limit the exchange-traded derivatives
25 to those in customer accounts.

1 Q. With respect to the e-mails that went back and forth with
2 respect to the OCC margin, or the margin held in the OCC
3 accounts by Lehman Brothers, those did not relate to customer
4 accounts, correct?

5 A. Not merely to customer accounts, no.

6 Q. And if this related only to customer accounts, it would
7 have been redundant, because paragraph 8 of the clarification
8 letter already dealt with that, correct?

9 A. Yes, although the provision in 8 -- yes. The provision in
10 (d) also. Not (d), I'm sorry. The provision in the first part
11 of (c) as well, "shall not include any and all property of any
12 customer whose accounts are being transferred to Purchaser as
13 part of the Business", would also have picked up potentially a
14 subset of customers as well as the provisions in Section 8.

15 Q. Yes. Now, you've already touched on this, but prior to
16 the sale hearing and prior to the closing, could Barclays have
17 known whether there would be an excess or a deficit with
18 respect to the exchange-traded derivative margin?

19 A. They couldn't have known for certain. They could have had
20 an idea what the estimate was. But we only had that data, so
21 far as I know, from OCC and not from necessarily all of the
22 other clearinghouses. So at least as far as I was aware, we
23 did not have a complete picture. And as I say, because the
24 markets in the United States are affected by what happens in
25 markets that are in a time zone ahead of us, you cannot

1 necessarily know with a high degree of confidence where you
2 will be on Monday based on where you are on Sunday.

3 Q. Now, in the agreement, Barclays agreed to acquire all of
4 LBI's accounts at the OCC, correct?

5 A. Correct.

6 Q. Barclays did not agree to acquire Lehman's accounts at the
7 DTCC, correct?

8 A. That is correct.

9 Q. And did you have an understanding why that was so?

10 A. My understanding was that Barclays was not comfortable
11 with the level of risk in which -- the financial loss that it
12 would be assuming if it were to assume the DTCC accounts.

13 Q. Did Barclays acquire assets held in Lehman's accounts at
14 the DTCC?

15 A. Certain assets, yes. They acquired assets in the
16 clearance box accounts.

17 Q. And do you -- and in the business that we're talking
18 about, is there made a distinction between accounts and the
19 assets held in accounts?

20 A. There's a fundamental distinction to the operation of our
21 clearing system, because -- precisely for the reason that the
22 clearinghouses rely on the creditworthiness of their clearing
23 participants. The clearinghouses look to the clearing
24 participants and require the clearing participants to be
25 responsible for all of the positions they carry, whether they

1 are positions of the participant or of customers of the
2 participant. So it is a fundamental structural element that
3 positions that may be owned by the clearing member or its
4 affiliates or its customers are all maintained in an account
5 which is carried by and in the name of the clearing participant
6 and for which the clearing participant is responsible. But
7 that says nothing about who -- the owner of the positions in
8 the accounts that are carried by the clearing member. If we
9 didn't have that system, then anyone who purchased securities
10 would have to be a clearing member of a clearing corporation in
11 order to have an account and own the assets in it. And that's
12 obviously not practical. That is precisely one of the
13 operational simplifications that the clearing system is
14 designed to address.

15 Q. Let me ask you to look at tab 21, which is Barclays
16 Exhibit 6. And do you recognize this document?

17 A. This looks like the agreement that memorialized the
18 resolution of the DTCC accounts.

19 Q. And --

20 A. And it appears to be the executed copy.

21 Q. At the time that the clarification letter was being
22 finalized, were you aware of this document?

23 A. Yes. Well, aware of this document, but the document was
24 completed very early in the morning, as was the clarification
25 agreement. Basically we had work streams in parallel on all of

1 the documents and, obviously, until all of the documents were
2 completed to the satisfaction of all the signatories, at which
3 point they would be delivered to the closing table, and
4 everything would be executed and delivered with effect at the
5 same closing time.

6 Q. As you understood it, did Barclays Exhibit 6, the DTCC
7 letter agreement, affect at all the purchase by Barclays of
8 assets held in the clearance box accounts?

9 A. No, not at all.

10 Q. At any time when the clarification letter was being
11 negotiated, or thereafter in September or October of 2008, did
12 anyone assert that the DTC (sic) letter affected at all
13 Barclays' acquisition of assets in the Lehman clearance box
14 accounts held at the DTCC?

15 A. Not to my knowledge during that period. It did come to my
16 attention at some point, and I don't know precisely what the
17 time period is that the trustee objected to requested transfer
18 of the clearance box assets that were at DTCC.

19 Q. But without remembering exactly when it was, was that --
20 would that have been after the closing of this transaction?

21 A. A significant period after the closing, yes.

22 Q. During the negotiations with respect to what became the
23 DTCC letter, were you on the telephone for a number of these
24 discussions?

25 A. I was on a number of calls. I wasn't on every call for

1 every minute, but I was on most of the calls for most of the
2 time, yes.

3 Q. And were you on the call when the agreement was finally
4 agreed to?

5 A. I was on that call.

6 Q. And in that call or in any of the other prior calls that
7 you participated in, did anyone suggest that Barclays was not
8 acquiring the Lehman assets in the DTCC clearance box accounts?

9 A. I did not hear that in any of the conversations with DTCC.
10 It wouldn't -- it wasn't consistent with the tenor of the
11 conversations.

12 Q. What do you mean by that?

13 A. Well, the DTCC arrangements, as they were contemplated at
14 the time of the sale order, provided that there would be a
15 limited amount of financial protection provided to the DTCC
16 with respect to those accounts, and they consisted of 250
17 million dollars' holdback in the consideration that was going
18 to be part of the deal purchase and, in addition, I believe,
19 approximately 3 million dollars in residential mortgages that
20 were going to be set aside for the purpose of setting off any
21 shortfalls. It became -- it emerged that Lehman did not have
22 the residential mortgages available to make available for that.
23 And then the question became would Barclays assume any
24 responsibility or financial liability for the accounts and, on
25 the other hand, what would DTCC be satisfied with. So the

1 discussion was always about liability to DTCC for the account
2 and what credit support, if any, might be made available.

3 Earlier in the day, there had been -- earlier in the
4 weekend, I should say, at some point -- I'm not very certain
5 about the distinctions between Saturday afternoon and Sunday
6 morning and afternoon. My recollection is that DTCC had said
7 that they were looking for a fairly significant sum of money in
8 order to just not close down all of the accounts. It was more
9 than -- I can't remember precisely what the amount was, but
10 something in the order of a billion dollars. And that had not
11 been -- that was not acceptable to Barclays.

12 And in the process -- in the period between that call and
13 the later call, what we were waiting to hear was whether DTCC
14 was going to be willing to proceed to process the transactions
15 and then go into liquidation, relying on the 250 million
16 dollars of purchase price that was going to be withheld and
17 made available.

18 And the last phone call was in a -- was basically DTCC --
19 I think the person who was speaking for them was Larry
20 Thompson, their general counsel, indicating that they were
21 going to cease to act for the accounts after they processed
22 pending transactions, that they would take the 250 million
23 dollars and would not require additional credit support from
24 Barclays or Lehman. That was regarded as a satisfactory
25 resolution of the DTCC situation, I'm assuming, in large part

1 because of their ability to look at what was pending in the
2 clearinghouse and evaluate the risks that they were undertaking
3 as a result of that.

4 Sometime after that call -- I should back up and say by
5 way of background that there was -- as I said, there were a lot
6 of brushfires; there were a lot of issues that needed to be
7 nailed down, and there were different work streams working on
8 them. The regulators were very concerned both in the
9 outcome -- the ultimate outcome, and in any issues that may be
10 presented. So it was requested that we open a line and a large
11 conference room at Weil, which Weil made available. It was a
12 very large conference room. It was probably as large or larger
13 than this room. And they opened a line. There were a lot of
14 people calling in at various times; various people were in it:
15 Weil Gotshal lawyers, the trustee's lawyers, the creditors'
16 committee, Barclays' lawyers. It was an open facility. And
17 the purpose of it was to report so that everybody could hear at
18 the same time both what the issues were, what the parties'
19 positions were and what issues were being resolved.

20 That's -- my recollection is that at some point after the
21 DTCC call, we went back into that room, and the DTCC was
22 summarized. I believe, the person speaking, again, for DTCC --
23 but there must have been a lot of people in this room --
24 included -- or was Larry Thompson, again, the general counsel.
25 And I don't recall anybody saying that Barclays had agreed to

1 relinquish the clearance box assets that it was otherwise to
2 acquire as part of the assets of the business. Indeed,
3 immediately after the resolution of the DTCC issues, the
4 lawyers were modifying the clarification agreement to deal with
5 elements of the DTCC resolution. There was added a provision
6 that said the liabilities associated with the DTCC accounts
7 were excluded liabilities under the agreement.

8 At the same time, there was a change to a provision
9 dealing with clearance box assets that clarified that Barclays
10 was getting all of the clearance box assets it had previous --
11 the previous provision had limited it simply to the DTCC 074
12 account. And it was brought to the attention of the lawyers
13 that the clearance box assets were not only not limited to the
14 074 account at DTCC, but they were not limited to DTCC,
15 although the vast majority, I understand, were located at DTCC.

16 There was no provision in the context of those changes to
17 say that the purchased assets didn't include what was in those
18 accounts; quite to the contrary. It was very specific change
19 made after the DTC (sic) arrangement was made to specify that
20 the clearance box assets were going to Barclays. And at the
21 same time, there was a resolution of issues that had arisen
22 with respect to JPMorgan and certain accounts in which it
23 custodied assets of Lehman that needed to be transferred.
24 There was a provision in that agreement dealing with the
25 relinquishment of claims which specifically reserves claims

1 with respect to customers and the lien-free accounts.

2 Q. Let me follow up a few things in that answer. First, I
3 think you said that the purpose of the DTC letter agreement was
4 to define what protection the DTCC had and not to relinquish
5 any rights that Barclays was getting under the APA; is that
6 correct?

7 A. That is correct.

8 Q. And after the DTCC letter agreement was agreed to, the APA
9 was modified to include a reference to that agreement, right?

10 A. Yes, specifically.

11 Q. And after the APA -- or after the DTCC letter agreement
12 was agreed to, the APA was also modified to broaden the assets
13 that were being acquired to not just the 074 account clearance
14 box assets but to all of the clearance box assets?

15 A. Correct.

16 Q. And would that have made any sense at all, or would there
17 have been any reason for that at all, if Barclays was giving up
18 the right to any of the clearance box assets?

19 A. It would have made no sense, and anyone who had heard the
20 resolution of the DTC situation, if in hearing it had heard
21 that that was going to happen, would never have drafted those
22 provisions as they were drafted.

23 Q. And you also mentioned something that related to JPMorgan
24 Chase, and in that connection let me ask you to look at tab 22
25 in your book. And this is Barclays Exhibit 7, and this was an

1 agreement that was executed, again, as of September 22, 2008,
2 correct?

3 A. Yes.

4 Q. And was this the agreement that you referred to relating
5 to the JPMorgan Chase issue?

6 A. Yes, it is.

7 Q. And if you look at page 2, paragraph 2, it spells out
8 there that, with respect to JPMorgan Chase, "BarCap shall have
9 no interest in the cash, securities or other property in the
10 accounts on the date hereof, other than any accounts maintained
11 for LBI's customers or any lien-free accounts at Depository
12 Trust Company," do you see that?

13 A. Yes, I do.

14 Q. And there was no such language included in the APA,
15 correct, or the clarification letter?

16 A. No. Well, let me ask you to clarify your question --

17 Q. Yes.

18 A. -- Mr. Boies. This is consistent with the maintenance of
19 BarCap's interest in the lien-free accounts, which was
20 necessary to effectuate the purposes of the clarification
21 letter provisions that contemplate -- or, I should say, that
22 provided that the clearance box assets were to be transferred
23 to Barclays as part of the purchased assets of the business,
24 consistent with the original purchase agreement.

25 Q. Yes, this is consistent with Barclays acquiring the

1 clearance box assets --

2 A. Correct.

3 Q. -- that we're talking about in this proceeding?

4 A. Yes.

5 Q. And it also shows that the parties knew how to draft
6 language that said BarCap would be limited to accounts
7 maintained --

8 A. I see. Yes.

9 Q. -- for customers, if they wanted to?

10 A. Yes. This draws a distinction between accounts and
11 property in the accounts that is not drawn in the DTCC letter.

12 Q. And not drawn in the clarification letter?

13 A. And not drawn in the clarification letter in relation to
14 the clearance box assets, yes.

15 Q. Now, after the closing, were you aware of documents that
16 were circulated by Weil Gotshal which were consistent with
17 Barclays acquiring the clearance box assets at the DTCC?

18 A. I don't know that I saw them at the time, but I've come to
19 be aware that they exist.

20 Q. Let me ask you to look at tab 23. This is Barclays
21 Exhibit 251. And the heading -- the first substantive e-mail
22 is from Rod Miller to Lori Fife on the subject of Schedule B.
23 And it says "This" -- and then the e-mail that goes to Mr.
24 Miller that is being forwarded says "This is the additional
25 collateral that we would deliver."

1 A. Yes.

2 Q. Do you see that? And did you understand that Schedule B
3 related to assets that were going to be transferred to Barclays
4 pursuant to the APA?

5 A. Yes. My understanding was Schedule B was an effort to
6 itemize clearance box assets, but I'm not sure that the
7 information was available. I'm not sure if it was completed by
8 the time of the closing.

9 Q. And this is a -- an e-mail dated September 21st, 2008,
10 which is prior to the closing, is that correct?

11 A. Yes, it is.

12 Q. And then if you look at tab 24, the next tab, which is
13 Barclays Exhibit 326, and this is Re: Schedules A and B, and
14 this dated September 29, 2008; do you see that?

15 A. Yes.

16 Q. And this sets forth in the attachment what is referred to
17 as a division of assets and liabilities; do you see that on the
18 third page of the exhibit?

19 A. Yes.

20 Q. And under "Securities and Trading Operations" down at the
21 bottom, in listing the purchased assets, the item is
22 "securities and other assets held in LBI's clearance boxes as
23 of the time of the Closing, provided, however, that the
24 Purchaser", that's Barclays, "in its discretion may elect
25 within sixty days after the Closing to return any securities or

1 assets to LBI. Note that Schedule B to the Clarification
2 Letter sets forth the securities and other assets held in LBI's
3 clearance boxes as of June" -- "as of September 21st, 2008."

4 Do you see that?

5 A. Yes, I do.

6 Q. And is that consistent with your understanding?

7 A. Yes.

8 Q. And just for completeness, although it goes back to
9 something that we were talking about before, if you turn the
10 page, at the very top you will see that Weil Gotshal again
11 includes in purchased assets all exchange-traded derivatives
12 and any property that may be held to secure obligations under
13 such derivatives.

14 A. I see that.

15 Q. Let me turn now to the 15c3 issue. First, let me begin
16 with the clarification letter, which of course is at tab 13,
17 and that's Barclays Exhibit 5. And if you turn to paragraph 8,
18 which is on page 4, it says that "The Purchaser shall be" --
19 "shall receive", and then the second item states "to the extent
20 permitted by applicable law and as soon as practicable after
21 the Closing, 769 million of securities as held by or on behalf
22 of LBI on the date hereof, pursuant to Rule 15c3-3 of the
23 Securities Exchange Act of 1934, as amended, or securities of
24 substantially the same nature and value"; do you see that?

25 A. I do see that.

1 Q. Now, I want to focus on the language "or securities of
2 substantially the same nature and value". Did you have an
3 understanding from your participation in the negotiations as to
4 what the purpose of that language was?

5 A. Yes. That language to -- was to address the possibility
6 that if the assets weren't available from the 15c3-3 account,
7 they would be made available from outside the account.

8 Q. Now, had Lehman represented that the assets in the 15c3
9 reserve account were in excess of what was required?

10 A. I didn't have a direct conversation with Lehman about
11 that, but I was informed that the Barclays team was of the
12 view -- was told that this was excess to the requirements for
13 the reserve account and that the SEC had authorized the
14 withdrawal of something like a billion dollars from the 3-3
15 account. And that was -- identifying that value was regarded
16 as extremely important because of concerns about assets and
17 values eroding over the weekend before the deal was closing, I
18 guess the -- one example being the residential mortgages that
19 were no longer -- we were informed were no longer part of the
20 deal. And one of the things that the Lehman side was doing
21 over the weekend so the deal didn't fall apart was to find and
22 identify, for their counterparts at Barclays, areas in the
23 assets that were being purchased under the asset purchase
24 agreement that had value that may not have been specifically
25 identified previously but that were part of the transaction and

1 had a value that might ameliorate concerns that Barclays might
2 have about the loss of assets to be delivered.

3 So there was a focus on this particular source of value
4 and clarifying, for the avoidance of any doubt, that it would
5 be part of the purchased assets.

6 Q. Now, at the very beginning of this description, it says
7 "to the extent permitted by applicable law"; do you see that?

8 A. Yes.

9 Q. Now, were there drafts of this provision prior to the
10 final draft that did not have that language in it?

11 A. I'm not sure whether or not the evolution of the
12 negotiation of this provision was manifested in interim
13 writings. It -- there -- it may have been -- it may have been
14 the case, but what I recall is the evolution of the negotiation
15 about this.

16 And we had proposed that the 769 million dollars' worth of
17 securities would be made available as contemplated here. There
18 was a hallway conversation with Weil's -- with representatives
19 from Weil on this subject, which led to the addition of the
20 words "to the extent permitted by applicable law".

21 Q. Let me see if I have the chronology right. In terms of
22 the negotiations, there was a negotiated provision that would
23 have provided the 769 million dollars, and then there was a
24 question raised and the "to the extent permitted by applicable
25 law" --

1 A. Yes.

2 Q. -- was added?

3 A. Harvey Miller said, you know, 'Can we do this? Do we need
4 to get the SEC to approve it?' And I said that I didn't think
5 that that was the case but, to the extent that he had such a
6 concern, that we would be happy to accommodate it by
7 conditioning the delivery of the securities by the phrase "to
8 the extent permitted under applicable law". I think we didn't
9 share the same analysis of the legal issue, but it seemed to me
10 that we could avoid trying to battle it out and see who was
11 right and who was wrong, by using this language.

12 Q. Now, when you added the language "to the extent permitted
13 by applicable law", why did that make it necessary to add the
14 "or securities of substantially the same nature and value"?

15 A. Well, as soon as we -- as soon as the draft acknowledged
16 the possibility that the value was -- that the securities might
17 not be made available, because the whole purpose of this was to
18 identify this as an asset that would be available to Barclays
19 following the closing, we said, 'Well, if there are
20 restrictions by virtue of the fact that these securities are in
21 the 3-3 account, then you should provide to us securities of
22 equivalent value that are not subject to that encumbrance.'

23 Q. And was there agreement on that?

24 A. Yes, there was agreement on that, and the agreement is
25 reflected in this language.

1 MR. BOIES: Your Honor, I have no more questions.

2 THE COURT: Cross-examine?

3 MR. MAGUIRE: If it please the Court, Bill Maguire for
4 the SIPA trustee. May I approach, Your Honor?

5 THE COURT: Yes.

6 (Pause)

7 THE COURT: Thank you.

8 (Pause)

9 CROSS-EXAMINATION

10 BY MR. MAGUIRE:

11 Q. Now, sir, you were designated as a 30(b)(6) witness in
12 this matter, were you not?

13 A. I was.

14 Q. And that's on the subjects generally on which you have
15 testified here on your direct, is that correct?

16 A. That's right.

17 Q. In fact, you submitted a declaration, did you not, in
18 support of Barclays' position in this litigation as a 30(b)(6)
19 witness?

20 A. I did.

21 Q. I'd like to start, sir, by asking you about the 15c3
22 matter that you just finished discussing with Mr. Boies. When
23 we talk about 15c3, we're of course referring to a Rule, an SEC
24 Rule, isn't that right?

25 A. That is correct, yes.

1 Q. And that is colloquially known as the customer protection
2 rule, is it not?

3 A. Yes.

4 Q. And Lehman maintained an account for the protection of
5 customers under that Rule, isn't that right?

6 A. Lehman did.

7 Q. And at one point in the course of this deal, there was an
8 expectation by Barclays, was there not, that it would get the
9 entire amount of that customer protection account?

10 A. Yes, I think that's true.

11 Q. And, all in, that was some 1.7 billion dollars, isn't that
12 right?

13 A. I'm not sure about the number. I'm not disputing it. But
14 in concept it would have been the 15c3-3 account.

15 Q. And I believe, in the binder that Mr. Boies gave you,
16 there was an e-mail that gave a breakdown of those numbers.
17 Did you review that binder before you testified today?

18 A. Yes.

19 Q. And do you remember that e-mail that laid out 1 billion
20 dollars in cash and 769 million dollars in securities?

21 A. Yes, I do remember that.

22 Q. Now, you've described how this 15c3-3 issue evolved. In
23 effect, there was, was there not, a heated debate in the
24 hallway at Weil Gotshal concerning the cash, the Lehman cash,
25 that was in the customer protection account?

1 A. I wasn't a party to a heated exchange. There were a
2 series of conversations. And before the conversations turned
3 to this particular language in which people were focusing on
4 the 769 million in securities, there was a discussion about the
5 1 billion dollars in cash, yes.

6 Q. And Michael Klein and the Barclays representatives
7 maintained that Barclays was entitled to the entire account,
8 including the one billion dollars in cash that was at the Wells
9 Fargo bank account, isn't that correct?

10 A. He may have. I didn't hear him say that, but it wouldn't
11 have surprised me. I think the 15c3-3 account would have been
12 regarded as an asset of the business that was being purchased.
13 And there wasn't a specific provision excluding it except for
14 the one which you were going to touch upon next.

15 Q. The hallway conversation, just so we're clear, was at Weil
16 Gotshal at the --

17 A. Yes, it was in the hallway, yes.

18 Q. -- at the conference center? And this conversation went
19 on for some period of time?

20 A. Yes. As I say, there were a number of conversations, but
21 yes.

22 Q. And they involved Michael Klein?

23 A. Michael Klein was there.

24 Q. And Michael Klein wanted to have the one billion dollars
25 of cash for Barclays, did he not?

1 A. I believe he did.

2 Q. And on the other side, Harvey Miller was representing
3 Lehman, isn't that right?

4 A. When I was there, Harvey Miller was there in the
5 discussions, yes.

6 Q. And when you were there, Mr. Miller was very clear, was he
7 not, that a representation had been made to the Court that no
8 Lehman cash was going to Barclays?

9 A. I would not describe it in that way. There was a
10 question, and this permeated some of the issues that we
11 addressed as to what was said to the Court and also how the
12 provisions on cash interplayed with the other provisions on --
13 of the purchased assets. There was some discussion about that,
14 and the resolution of it was that Barclays would, instead of
15 providing for the billion dollars in cash, provide for the
16 securities that comprised the 769 million.

17 Q. Let me probe a little bit into the "some discussion" on
18 that specific point. And I'd invite you to look at the
19 testimony of Harvey Miller to this Court on April 28 at page 83
20 of the official transcript, starting at line 2. "Number two,
21 we had made a representation to the Court that no cash was
22 going to Barclays, and there was no way we were going to let
23 that billion dollars go to Barclays." That is the nub of the
24 hallway conversation on this point. That is what Harvey Miller
25 made clear in the hallway of this conference center to Michael

1 Klein and the other representatives of Barclays, isn't that
2 correct?

3 A. I did not hear Harvey Miller -- I'm not contradicting that
4 this is what Harvey Miller testified, but I did not hear Harvey
5 Miller use those words in the hallway. I may not have been
6 present for the entire day of the exchanges on the cash
7 component, but I didn't hear the discussion in those terms.

8 Q. In any event, the Barclays representatives came back and
9 said that, rather than come back to the Court, or rather than
10 disagree about what had been said, they would simply give up on
11 the one billion dollars and that would be out of the deal, and
12 the 15c3 asset would simply be the 769 million of securities --

13 A. I don't --

14 Q. -- is that correct?

15 A. I don't recall anybody saying 'rather than go back to the
16 Court'. There was an issue about it. There was concern.
17 There may have been concern about the amount. Suffice it to
18 say that the Barclays side agreed to move on from the
19 discussion about the one billion dollars and instead focus on
20 the 769 million dollars.

21 Q. So once you moved on from the billion dollars cash, that
22 left the 769 million and that was securities that were
23 maintained in this customer protection account?

24 A. In the 3-3 account, right, yes.

25 Q. And that's where Mr. Miller raised the remaining concern

1 he had as to whether we can do this?

2 A. Yes, that's correct.

3 Q. And that was resolved by adding the words "to the extent
4 permitted by applicable law", isn't that right?

5 A. That's correct.

6 Q. His position was that you needed SEC approval here. You
7 didn't think that was necessary. But in any event, Weil wanted
8 limitation, and the limitation that was added here was "subject
9 to the" -- or "to the extent permitted by applicable law"?

10 A. Right, and if applicable law limited the transfer of
11 something that was contemplated to be part of the purchased
12 assets, then other assets of equivalent value were to be
13 provided. That was the economic substance of the negotiation.

14 Q. Okay.

15 A. Sorry --

16 Q. So --

17 A. -- I'm getting ahead of you.

18 Q. -- let's focus on that. You're telling us that in the
19 course of this hallway conversation, there was an agreement not
20 only that this whole transfer would be subject to applicable
21 law but also that, if for any reason the transfer of the 769
22 million was illegal or could not be done consistent with
23 applicable law, that Barclays would get a makeup from Lehman;
24 Lehman would have to get the 769 million dollars from somewhere
25 outside the customer protection account if it couldn't access

1 it inside the customer protection account?

2 A. Or another one of the sellers. LBHI had access.

3 Q. In any event, somewhere --

4 A. Yes, some -- from some source other than the 3-3 account.

5 But as I say, we were under the impression that it was an
6 excess in any event, in which case there wouldn't have been any
7 restriction.

8 Q. And it's your testimony that in the course of those
9 hallway conversations, Lehman agreed to this, that
10 unconditionally Barclays would get the 769 million no matter
11 what?

12 A. From within the account or from another source, yes.

13 Q. Let me invite you to look at Mr. Miller's testimony from
14 the April 28 trial hearing, at page 84, starting at line 3
15 through line 10:

16 "Q. Did you or anyone that you know acting on behalf of Lehman
17 undertake or give Michael Klein or anyone at Barclays a
18 commitment that if there was a regulatory problem and the 769
19 million dollars in securities could not be transferred from
20 inside the 15c3 account, Lehman would be required to substitute
21 and provide 769 million dollars from somewhere outside that
22 account?

23 "A. Absolutely not."

24 A. I see that.

25 Q. Your testimony is the exact contrary, is it not, of the

1 testimony this Court has heard from Harvey Miller?

2 A. My testimony is that we negotiated the language in the
3 agreement, and I think the language in the agreement speaks for
4 itself and provides that if the securities are not available in
5 the 15c3 account, they would be made available from some other
6 source.

7 Q. Now, let's not talk about the language. Let's first focus
8 on the hallway conversation, sir. It's your position, is it
9 not, that in the course of this hallway conversation, Lehman
10 agreed to what Mr. Miller has testified Lehman absolutely did
11 not agree to?

12 A. Well, what I'm saying is they agreed to the language, and
13 this is important because the agreements are reflected in the
14 words that people use, and what he agreed to was the addition
15 of the language -- I'm sorry, I don't have the clarification
16 provision in front of me -- "or securities of a similar nature
17 and value".

18 Q. In the hallway? In the hallway?

19 A. Yes.

20 Q. In the hallway, you're saying that Harvey Miller agreed to
21 add language that would unconditionally give Barclays a right
22 to 769 million dollars?

23 A. Let me put it this way: The language was proposed and,
24 although there is an interim step that I'm sure we're going to
25 be talking about, yes, the language came back from Weil

1 Gotshal, including the language that we've been describing that
2 you have Mr. Miller apparently giving a different view on.

3 Q. I'm not talking about the language that came back. We
4 will get to the language that came back.

5 A. Okay.

6 Q. Now I'm talking about the hallway. In the hallway, you're
7 saying that Harvey Miller agreed to what he specifically
8 testified here he did not agree to?

9 A. No. You're putting words in my mouth. I'm saying that we
10 agreed to the formulation that if the 769 million dollars of
11 securities were limited by applicable law, that we would get --
12 or -- I'm sorry, am I entitled to have the clarification of
13 your provision just so that I can -- I may have it here.

14 THE COURT: If counsel will permit, I think the
15 witness should have a chance to take a look at the document if
16 he wishes to.

17 MR. MAGUIRE: By all means, Your Honor, except that my
18 question is not addressed to the document. My question --

19 THE COURT: I understand your question's about the
20 hallway conversation.

21 MR. MAGUIRE: Yes.

22 A. Yes, you're --

23 THE COURT: And I also understand the witness is --

24 A. I'm telling you that the --

25 THE COURT: -- referring to the document.

1 A. -- that the hallway conversation is about the words that
2 were included ultimately in the contract. Whether or not
3 there's an argument about how people construe that is a
4 different matter. We proposed the "or" language precisely
5 because of the concerns about any limitation, and we proposed
6 the language and I can only infer that the Weil lawyers found
7 it acceptable because they controlled the documents and they
8 provided it back to us.

9 Q. And, sir, I have no objection to your taking as much time
10 as you wish to look at any document that you want, but I would
11 ask you, before you do that, to answer this one question.

12 A. Sure.

13 Q. I would like you to be very clear with whether you are
14 saying, before anybody exchanged any piece of paper, just in
15 the hallway, are you testifying to this Court that Harvey
16 Miller agreed that Barclays would get 769 million dollars
17 unconditional?

18 A. I'm -- I'm not testifying about what Harvey Miller said.
19 I'm testifying about -- and I do not remember in haec verba
20 each of the words that we exchanged, but I am saying that
21 Harvey Miller and/or one of his partners who was involved in
22 the drafting at this point agreed at our request, in light of
23 the limitation on the first part of the provision that limited
24 the removal of the 769 "to the extent permitted by applicable
25 law", to add language providing "or securities of a" -- and let

1 me -- I have it here in front of me -- "or securities of
2 substantially the same nature and value". Actually, we -- I
3 think we probably articulated it as "securities of equivalent
4 value".

5 Q. Can you turn, sir, to your deposition transcript, which is
6 at the very beginning of the binder that I provided here? If
7 you could turn, sir, to page 105, starting at line 4. You
8 testified as follows, sir:

9 "Q. And can you tell me what you recall being said in the
10 course of this hallway conversation?

11 "A. Pretty much what I have just described to you: that there
12 was a group already there when I arrived. I guess some
13 predecessor language to this was being reviewed. And Harvey
14 Miller, as I said, raised the question whether there might be
15 limits under applicable law, and I said that I wasn't aware of
16 any but, to the extent that they exist -- and this would
17 address your concern -- we can provide that the transfer be to
18 the extent permitted by applicable law but, if there was such a
19 constraint, that that basically -- 769 million dollars in
20 securities would come from somewhere else."

21 A. Right.

22 "A. And can I remember exactly what was said, whether it was a
23 grunt or a nod or a smile? I don't remember. But I remember
24 coming away from the conversation feeling that we had sort of
25 resolved the point."

1 Q. You were asked that question and --

2 A. Yes.

3 Q. -- you gave that answer, sir?

4 A. That's correct, and I think it's consistent with what
5 we've been discussing here today. I believe the agreeing to
6 that language is agreeing that the securities, if unavailable
7 from the 3-3 account, will be made available from outside the
8 account. Now, somebody else apparently is construing that
9 language in a different way. I think the language is quite
10 clear on its face.

11 Q. And the manifestation of consent that you took away was
12 some grunt or nod or smile on the part of Harvey Miller or one
13 of his colleagues, is that correct?

14 A. Yeah, it was the end of -- let's put it this way: It was
15 the end of the conversation, and we expected imminently to see
16 language that reflected the end of the conversation. So, yes.
17 I don't remember the words, but I -- but my expectation was
18 met, at least initially in some part, by the language that came
19 back from Weil.

20 Q. Your deposition was not actually the first time that you
21 testified about this 15c3 asset, isn't that right, sir? You
22 had put in a declaration on the same subject?

23 A. There's a declaration, yeah.

24 Q. And I believe that's in tab 3 of your binder. And you put
25 this in, as you say, as a 30(b)(6) witness?

1 A. I'm sorry, I'm in the wrong binder. Did you say tab 3?

2 Q. Tab 3, yes, sir.

3 A. Yes.

4 Q. And you understood at the time that you did this
5 declaration that this was an important litigation, did you not?

6 A. I did.

7 Q. And you prepared with your lawyers this declaration, did
8 you not?

9 A. Yes.

10 Q. You also met with Barclays' lawyers, did you not?

11 A. (Pause).

12 Q. You met with Barclays' lawyers, did you not?

13 A. Yes, at one point.

14 Q. And I believe you referred to this 15c3 asset in paragraph
15 7 of your declaration. And you refer at the bottom of page 3
16 to this extent of "to the extent permitted by applicable law";
17 see that?

18 A. Yes.

19 Q. You say nothing, however, about any commitment that was
20 made by anyone in any hallway conversation that Barclays would
21 get 769 million dollars, isn't that right, sir?

22 A. Yes, this did not go to that issue. We did not realize
23 that that was an issue.

24 Q. And you can't tell us why you did not include that --

25 A. I didn't realize --

1 Q. -- in that declaration?

2 A. -- that that was an issue at the time that we did this
3 declaration. I did not know that anybody was making an issue
4 of what the "or nature or value" meant.

5 Q. Despite all your meetings with Barclays' lawyers and your
6 meetings with your own lawyers --

7 A. And how smart they are.

8 Q. And somehow --

9 A. Despite how smart they are.

10 Q. -- somehow that all slipped by.

11 A. No, we certainly weren't saying that we were going to get
12 it out of the 3-3 account, hell or high water.

13 Q. Now, sir, you left this hallway conversation with the
14 feeling that you would somehow resolve the point, right?

15 A. (No audible response)

16 Q. And Weil Gotshal had undertaken to provide you with a
17 draft?

18 A. Yes. Right.

19 Q. And, in fact, Weil Gotshal did provide you with a draft,
20 isn't that right?

21 A. They did.

22 Q. And that draft is tab 2 in your binder; that is Movants'
23 Exhibit 447, which I believe you looked at earlier with your
24 counsel. That's the 4:36 a.m. Monday draft. You see that?

25 A. I see -- yeah, I see the draft on --

1 Q. And you got this draft expecting to see that you would get
2 this language confirming your feeling that --

3 A. My impression, yes.

4 Q. -- Barclays was going to get 769 million no matter what,
5 isn't that right?

6 A. I expected to see language that described the securities
7 that they would get, if not from the 3-3 account, in terms of
8 it being of equivalent value. That was the concept that was
9 important.

10 Q. And then if we turn to page 5, you'll see that the
11 language that Weil Gotshal provides, at least from Barclays'
12 standpoint, doesn't work.

13 A. Yes, "or securities of substantially the same nature".

14 Q. What they --

15 A. Well, it wasn't clear. Yeah.

16 Q. What they said was "or securities of substantially the
17 same nature". And you recognized that that didn't work?

18 A. Right.

19 Q. In fact, you didn't know what that meant?

20 A. I would say I had uncertainty about how the word "nature"
21 would -- might be construed and whether it adequately conveyed
22 the concept of equivalent value, because that at the end of the
23 day was what was important, whether the securities had
24 equivalent value.

25 Q. You never asked Weil what it meant by that language, did

1 you?

2 A. No, I proffered the language "and value" and they accepted
3 it. So I assumed that they did not intend to import a
4 description that would have resulted in the delivery of
5 securities having a different value.

6 Q. And you thought that by adding two words, "and value",
7 this would then become a provision that clearly provided
8 Barclays with the right, no matter what, to 769 million dollars
9 that it might not otherwise get?

10 A. I believe it entitled Barclays to 769 million dollars'
11 worth of securities; if they weren't available from the 3-3
12 account, they'd be made available elsewhere from LBI or LBHI,
13 yes.

14 Q. And the fix was those two words, adding "and value", as
15 far as you were concerned?

16 A. Well, the fix to the ambiguity that I thought I saw in the
17 use of the word "nature", yes.

18 Q. And you never discussed that with Harvey Miller? You
19 never said --

20 A. No.

21 Q. -- 'We're adding these two words and, as a result of these
22 words, we will get 769 million' --

23 A. No.

24 Q. -- 'no matter what'?

25 A. It was paper passed back and forth, as frequently happens.

1 Q. And you never had any discussion with anyone at Weil
2 Gotshal as to what would happen if in fact there was a deficit
3 in the 15c3 account or a shortfall in customer property? You
4 never had that discussion, did you?

5 A. We -- let me back up by saying, first, we were under the
6 impression that this was an excess; secondly, we were not under
7 the impression that the purchased assets included all of the
8 assets of Lehman. We had no idea whether or not there -- we
9 had no information that there might be, and I guess we still
10 don't know whether there will be, a shortfall in the assets
11 that are available to satisfy customer claims. But it seemed
12 to me that, in connection with a transaction to sell the
13 business of a broker-dealer in SIPC liquidation in connection
14 with a transfer of the customer accounts, that it was not
15 inappropriate for a portion of the 3-3 account to be allocated
16 as part of the transfer of the business that was being
17 transferred, correct.

18 Q. And you had no discussion with Harvey Miller or anyone
19 representing Lehman concerning the implications for customer
20 claims of having an absolute right for Barclays to get this 769
21 million dollars?

22 A. There was no reason to believe that it would necessarily
23 have a direct impact. There could have been -- there could
24 have been 3 billion dollars in other assets that could have
25 been transferred into the account to make the reduction of the

1 769, for all I knew.

2 Q. You had no discussions on that subject with anyone from
3 Weil or Lehman, isn't that right?

4 A. I had no discussions other than the information that was
5 conveyed to me that the Lehman side had led the Barclays side
6 to believe that this was an excess.

7 Q. And specifically no discussions on implications for
8 customer property claims of making this an unconditional right?
9 You had no such discussions?

10 A. There was no need -- there was no basis for us to assume
11 that it would have an impact.

12 Q. Were you present, sir --

13 A. It would have been -- it would have had no more of an
14 impact than if Lehman was able to say 'Oh, we lost the three
15 billion dollars in resis that we couldn't deliver, but the good
16 news is we have found three billion in other securities that
17 are part of the purchased assets that you can' -- 'that we can
18 make available to you.' It wouldn't necessarily have had more
19 of an impact than that. People didn't know exactly what all
20 the securities were, what all the values were, what all the
21 liabilities would end up being. So there's no reason for us to
22 have assumed, as you seem to be suggesting, that if we were
23 agreeing to this, we were necessarily taking money out of the
24 pockets of customers. That was not a necessarily implication
25 of this.

1 Q. Is that a no? You had no such discussions?

2 A. I apologize. Yes, that's a no. That's a no.

3 Q. Were you present, sir, when Harvey Miller warned Barclays
4 that its prospects of getting the 15c3 asset were slim to none?

5 A. He did not convey that in my presence. I'm not denying
6 that he said it. As I said, I was not continuously in all of
7 the conversation. I did not hear that.

8 Q. Were you present after the closing when Alastair Blackwell
9 went to meet with the SEC concerning a release -- of trying to
10 get a release of funds --

11 A. No.

12 Q. -- from the 15c3-3 account?

13 A. No, I was not.

14 Q. Now, you had many communications with representatives of
15 the Securities and Exchange Commission in the course of your
16 work on this deal, isn't that right?

17 A. I did. I had a number of interactions with them on a
18 number of issues, yes.

19 Q. You never at any stage, however, had any discussion -- you
20 never brought up or raised any issue with anyone at the SEC
21 concerning the customer protection account, isn't that correct?

22 A. No, I did not have a conversation with the staff at the
23 SEC about the customer protection account, and I'm not sure
24 that they would have been comfortable discussing it with me.
25 But, no, I did not.

1 Q. Sir, I'd like to turn now to another subject, and that's
2 the subject of Lehman's margin assets, okay? You testified on
3 direct that you were not present for the APA negotiations,
4 right? Is that correct?

5 A. The -- I tried to be very clear. I was not part of the
6 negotiating team, particularly on the business terms. But,
7 yes, I did provide some language that was included by my
8 partners in the agreement as it was ultimately --

9 Q. You got brought in particularly in dealing with clearing
10 agencies, like the OCC and the Depository Trust Clearance
11 Corporation, right?

12 A. Yes, although I was brought in initially in connection
13 with a request by the Federal Reserve and Barclays to enter
14 into the repurchase transaction. But I think the premise of
15 your question is correct that I was not a negotiator of the
16 business terms of the APA.

17 Q. You testified a little earlier about the sale order and
18 the concerns that the OCC had raised about the sale order on
19 the Friday of the hearing. If you turn to tab 4 of your
20 binder, you'll see a document -- I believe it's similar or the
21 same as what you testified to on direct. At the bottom of the
22 first page and over on the second page, you'll see the e-mail
23 from the OCC in which they were asking for language to be added
24 to the sale order. You see that?

25 A. On the bottom of page 2?

1 Q. Yes.

2 A. Is that your reference? Yes, I do see that, yes.

3 Q. And it was your understanding, was it not, that the sale
4 order was going to provide that assets that went to Barclays
5 were going to be given to Barclays free and clear? That was
6 the whole point of the 363 sale, right?

7 A. That the purchased assets would be free of any lien, yes.

8 Q. That obviously raised concerns with the OCC about any
9 assets, that were included in the sale, going to Barclays to
10 make sure that their interests and their rights were protected,
11 right?

12 A. They wanted to make sure that, by a transfer of the assets
13 in the clearing accounts, that by the terms of the order it
14 didn't inadvertently vitiate their lien under their contractual
15 or rule-based arrangements for clearing members, yes.

16 Q. And everybody wanted Barclays to step into the shoes of
17 Lehman, isn't that right? DTC wanted that, did they not?

18 A. I'm not sure at what point you're talking, and I think
19 you're asking me the hypothetical question would DTC have been
20 happy if Barclays merely assumed all of the liabilities that
21 were associated with the Lehman account. I imagine that would
22 have been a fully satisfactory resolution for --

23 Q. And certainly the OCC wanted Barclays to step into the
24 shoes of Lehman, right?

25 A. Well, no, I would say that the OCC observed that the

1 purchase agreement provided for the exchange-traded business
2 and its assets and the margin to go over to Barclays, and they
3 wanted to make sure that the process of approving that did not
4 result in those assets being released from the liens that they
5 had to ensure performance under the contracts in the accounts
6 that were being transferred.

7 Q. And the assets that were at the OCC were assets that were
8 either -- that you understood were assets that were maintained
9 there either for Lehman itself or for Lehman's customers?

10 A. They were Lehman assets to secure obligations under
11 contracts for which it was responsible, and those contracts
12 could have been -- as you say, could have been Lehman
13 contracts, could have been contracts of customers of Lehman.

14 Q. And whether it was customers or proprietary, the OCC had
15 certain rights, did they not, and they wanted those to be
16 protected in the event of customer assets or propri -- whatever
17 assets being transferred to Barclays, right?

18 A. Yes. They didn't want the transfer to Barclays of the
19 assets that Barclays was purchasing under the order to
20 eliminate the lien that they would have.

21 Q. And they provided language that would protect the lien
22 that they would have over any assets, whether they were
23 beneficially owned by a customer or by Lehman, whoever?
24 Whatever assets went to Barclays, OCC's rights would be
25 maintained, right?

1 A. Well, the lien was to be -- would be extinguished with
2 respect to purchased assets, not customer assets. So it would
3 have been of particular concern in relation to the provisions
4 in the purchased assets and the order that provided for the
5 sale of purchased assets.

6 Q. You were shown that asset purchase agreement by your
7 counsel -- or by counsel for Barclays, and I would like you to
8 turn to it. It's in tab 9 of your binder.

9 A. Yes.

10 Q. And you'll see there, sir, at page 6, there is a
11 definition of "purchased assets" that you testified about on
12 direct. Do you see that, sir? Specifically under "Purchased
13 Assets", Mr. Boies read to you the words "means all of the
14 assets of Seller and its subsidiaries used in connection with
15 the Business". You remember his reading those words?

16 A. Yes.

17 Q. And he left out the following words, "excluding the
18 Excluded Assets". That's an important exception, is it not?

19 A. If there are excluded assets, yes.

20 Q. And did you spend some time dealing with some of those
21 exclusions? Did you not?

22 A. Not in the APA, but we dealt with the clarification of
23 them in relation to certain categories in the clarification
24 letter, yes.

25 Q. Specifically with the exclusion for cash, isn't that

1 right?

2 A. Well, particularly in relationship to -- yes, in relation
3 to the -- sort of, the clearing accounts and the customer
4 property, some of which may be in the form of cash, yes.

5 Q. We'll come back to the exclusion for cash, but I would
6 like to just follow up on the testimony you gave concerning
7 Section B under Purchased Assets. And that section, you told
8 us, includes Lehman's margin, right?

9 A. Yes.

10 Q. All of Lehman's margin, right?

11 A. All of Lehman's -- all of the margin or other property
12 that secured the exchange-traded businesses that they were
13 getting, yes.

14 Q. Now, you were not yourself a member of the negotiating
15 team --

16 A. That's correct.

17 Q. -- isn't that right?

18 A. That is correct.

19 Q. But it's your view that, simply reading this language, it
20 includes deposits, and that would cover margin; is that your
21 testimony, sir?

22 A. I believe that that language would be read to include
23 margin deposits --

24 Q. You find that --

25 A. -- and guaranty fund deposits.

1 Q. You find that clear on its face?

2 A. I would read the language to have that meaning, yes.

3 Q. So reading this language, you see that it's disclosing to
4 the reader that Lehman's margin is going to Barclays?

5 A. I would say that this supports the conclusion and the
6 inference that would be drawn from that and other provisions
7 that that was the case.

8 Q. A reader reading Section B here would understand, in your
9 view, that in here with the deposits for the rent and the
10 electricity and the telephone is billions of dollars of Lehman
11 cash --

12 A. Those are examples following the word "including" in a
13 document that incorporates a rule of construction that makes it
14 clear that the enumeration of examples is not to be read to
15 limit the scope of the preceding reference, in this case to all
16 deposits, including customer deposits; makes it clear that it's
17 not just a deposit of Barclays. And candidly, if you look at
18 those categories of deposits, although they're not necessarily
19 in the same business line, they all involve the same concept:
20 money that is advanced to secure a future contingent or
21 noncontingent payment obligation.

22 Q. And you're suggesting that this is not just clear to you
23 but it's something that should have been clear also -- or was
24 clear also to Lehman?

25 A. It seemed to have been clear to the OCC, judging from

1 their reaction to reviewing the document and coming up with a
2 sale order that provided specifically for the handling of
3 marg -- what they described as margin depositions and clearing
4 fund deposits.

5 Q. And do you think --

6 A. I don't think I'm the only person necessarily that would
7 have read that to be consistent with other provisions in the
8 agreement relating to the exchange-traded derivatives business.

9 Q. Well, what about Barclays? Is it your view it'd be just
10 as clear to Barclays, to your client?

11 A. It may depend upon who the person is that you're talking
12 with and their sophistication about the subject and whether or
13 not they focused on the language, because, as you know, there
14 are certain things in the course of negotiating and documenting
15 a transaction where the lawyers' expertise prevails and in
16 other cases where, you know, the business objectives prevail.
17 And not every businessperson is as knowledgeable and -- about
18 how things are drafted and what they mean as necessarily the
19 people who draft them for them.

20 Q. Well, how about Barclays corporate, everybody: the
21 business, the most sophisticated executives, the negotiators
22 and their lawyers? You think it's clear to Barclays corporate
23 as it is to you?

24 A. You're asking me to speculate about something I don't have
25 direct knowledge of.

1 Q. Well, if a Barclays 30(b)(6) witness and its most senior
2 executive on this deal were to testify that the disclosure of
3 the transfer of margin in this deal was, in three words, in
4 "exchange-traded derivatives" and it was nowhere else in this
5 contract, that would suggest, would it not, sir, that that
6 witness and all of the people who assisted that witness and
7 provided information to that witness did not find it quite as
8 clear to them as you are now testifying to the Court you find
9 this provision today to be so clear to you?

10 A. That may be. You'd be asking me to speculate about facts
11 that I have not been a witness to. But that could be a
12 conclusion that someone would reach. And someone who is
13 knowledgeable, not just about canons of construction but also
14 knowledgeable the exchange-traded derivatives -- I can tell you
15 that a normal reader who is knowledgeable about that would not
16 find my construction to be stretched.

17 Q. I take it you are not aware of the testimony that Mr. Rich
18 Ricci provided to this Court on this subject?

19 A. No, I'm not familiar with the testimony of Mr. Ricci.

20 Q. And you're not aware of his status as a 30(b)(6) witness
21 on the disclosures that Barclays made concerning the
22 transfer --

23 A. I may --

24 Q. -- of Lehman's margin?

25 A. I may have known that.

1 Q. You are aware, however, that Mr. Ricci, unlike you,
2 actually was present at the negotiations?

3 A. Correct.

4 Q. He was in fact one of the top negotiators for Barclays?

5 A. He may well have been one of the top negotiators. How
6 actively he was involved in the actual drafting I don't know.

7 Q. Now, sir, on the Saturday, you had some e-mail
8 correspondence with the OCC on the subject of Lehman's margin,
9 isn't that right?

10 A. Yes.

11 Q. You were provided with a number of e-mails by your
12 counsel. And it was clear to you in the course of all of that
13 that Lehman had at least one billion dollars in cash margin at
14 the OCC, right?

15 A. Yes.

16 Q. You were specifically advised about that, and indeed your
17 counsel showed you an e-mail -- it's at tab 5 of your binder --
18 from the OCC. It's a 3:52 p.m. e-mail --

19 A. Um-hum.

20 Q. -- from the OCC to you in which it specifically advised
21 you that there were a number of -- three, in fact, major open
22 issues as far as the OCC was concerned, and the first one was
23 how to transfer the one billion dollars in cash to Barclays,
24 right?

25 A. I'm sorry, which provision are you referring to?

1 Q. If you look at paragraph numbered 1 --

2 A. Um-hum.

3 Q. -- how much of the approximately one billion dollars in
4 cash that the OCC is holding as margin for LBI accounts is
5 intended to be transferred to Barclays at closing, and how much
6 cash margin not transferred be replaced; do you see that?

7 A. Yes.

8 Q. So they were asking the question 'What was going to happen
9 this cash' --

10 A. Um-hum.

11 Q. -- 'Was it being transferred to Barclays or not? And if
12 it wasn't being transferred to Barclays, how was it going to be
13 replaced?', right?

14 A. In this e-mail, that's what he's asking, but in other
15 e-mails he says that he's assuming that it's going to Barclays
16 and he asks for instructions. And then he says, 'Having not
17 gotten' -- 'having received none, we're transferring this to
18 Barclays', in correspondence that copies the Lehman parties.

19 Q. And nobody from Barclays suggested to you that they had
20 any interest in replacing this one billion dollars in cash?

21 A. No. The contemplation was, as was provided in the
22 transfer and assumption agreement that the trustee had signed
23 and that was provided to us, that all of it was coming over,
24 without distinction as to whether it was cash or excess or
25 proprietary or had any other characteristics. It was all

1 coming over. We had confirmed with the OCC that that was our
2 understanding of the deal. We had given them some minor
3 comments, and I had conveyed to Jim McDaniel that I was focused
4 on other issues that needed to be resolved that are very
5 pressing. And so I was not focusing on any further resolution
6 of the OCC issues at that time.

7 Q. So it was very clear in your mind, as of 3:52 p.m. on
8 Saturday, that Barclays had no interest in replacing any of
9 this one billion dollars in cash and that Barclays' interest
10 was in having the entire one billion dollars in cash
11 transferred to Barclays?

12 A. It was very clear to me that the deal provided for that
13 margin, whether it was in cash or not, to go over to Barclays.

14 Q. And the third open item is how to obtain the transfer from
15 Lehman to Barclays of an additional almost billion dollars in
16 government securities that were at JPMorgan; you see that?

17 A. Yes.

18 Q. And you understood, sir, did you not, that all of this
19 property, this two billion dollars that were just covered, that
20 that was all Lehman proprietary property, right?

21 A. I don't think I knew specifically how much of it was
22 Lehman proprietary, but it wouldn't shock me if it was.

23 Q. Didn't you understand that all of the property that Lehman
24 maintained at the OCC was its own money?

25 A. The mar -- if you're talking about the margin, yes.

1 Q. Exactly. Isn't that what we're --

2 A. And my understanding was that they margined it. They used
3 their own money to margin the SEC accounts, yes.

4 Q. And that's what we're talking about here --

5 A. Yeah.

6 Q. -- right? This is two billion dollars in margin.

7 A. Right, so there were questions about the cash and there
8 were questions about the securities at JPM.

9 Q. So you understood the major open issue here was how to
10 transfer this cash from the OCC accounts to Barclays, and you
11 were also aware at the same time that --

12 A. No, no. No, that's not what I said.

13 Q. Go ahead, sorry.

14 A. That's not what this says. The issue is that what will
15 happen if it's not being transferred. It says how much is
16 going to be transferred at closing, and how will cash not
17 transferred be replaced.

18 Q. Okay, so you understood that there was a billion dollars
19 in cash at the OCC, and Barclays felt that it was entitled to
20 that?

21 A. Yes.

22 Q. You also understood that there as a substantial amount of
23 money, about a billion dollars in cash, in the customer
24 protection account, and that Barclays felt it was entitled to
25 that? This is of course Saturday, 3:52 p.m. This is well

1 before the hallway conversation that happens with Weil Gotshal,
2 before the 4:30 a.m. draft that you testified about earlier?

3 A. If you're asking what my state of mind was, I was not
4 thinking in any way about 15c3. But if somebody had asked me
5 an abstract question, I would have said that, subject to
6 parsing the excluded assets definition, the 3-3 account would
7 be regarded as an asset of the business that was being
8 purchased.

9 Q. At this point in time, 3:52 p.m. on Saturday afternoon,
10 you knew that the parties had signed up an asset purchase
11 agreement, did you not?

12 A. Correct.

13 Q. And you knew that there were exclusions in that asset
14 purchase agreement?

15 A. Yes.

16 Q. You knew specifically that there was an exclusion for
17 Lehman's cash?

18 A. There was an exclusion for, I think, certain cash, and
19 there were other provisions that seemed to me to include as
20 part -- that would include, as part of the business, assets
21 that could at some times have the form of cash, and that there
22 was a tension between the two. And one of the purposes of the
23 clarification agreement was to effectuate the intent of the
24 party to distinguish how the cash/noncash issue was to be
25 resolved with respect to certain categories of property.

1 Q. You drafted a carve-out from the cash exclusion?

2 A. I drafted a clarification that the provisions relating to
3 cash were excluded assets, did not include certain forms of
4 property, yes.

5 Q. And that is in tab 6, Barclays Exhibit 249. This is the
6 draft that your counsel showed you on direct, is that correct,
7 sir?

8 (Pause)

9 Q. Well, let me walk you through it.

10 A. Yes, this is the provision.

11 Q. You recall seeing this on direct? This is the 11:13 p.m.
12 e-mail that includes a draft from Cleary Gottlieb, right?

13 A. Right.

14 Q. And you'll see, if you turn to the second page, it has
15 "CGSH comments of September 20, 2008, 9 p.m.", right?

16 A. Correct.

17 Q. And if you turn, sir, to the page -- there should be a
18 little yellow Sticky on it. If you turn to the red line that
19 follows the clean version, and you'll see -- I believe it's
20 page 2, and you'll see a section on excluded assets. You see
21 that?

22 A. I'm not sure I see this blacklined version. Which tab did
23 you say it was on?

24 Q. We're at tab 6.

25 A. Yeah?

1 Q. And there should be a little yellow Sticky flag there.
2 But in any event, following the beginning of the cover e-mail,
3 there's a clean version and a redlined version. And then on
4 the second page of the redlined version, you will see the
5 Clearly Gottlieb language that was added in this 9 p.m. draft.
6 You see that?

7 A. I see this language, yes.

8 Q. And the language that you added specifically noted that,
9 except as otherwise specified in the definition of purchased
10 assets -- okay, you added that, right?

11 A. Did I personally? No.

12 Q. Well, Clearly Gottlieb --

13 A. Yes.

14 Q. -- certainly did, right? This is a Clearly Gottlieb team
15 that was working with you? Then it goes down to say that
16 excluded assets are not included. If you skip over to customer
17 fees, right? Then we have cash, cash equivalents, bank
18 deposits of similar cash items, and that's a reference to the
19 c3. It goes on: "maintained: (a) by or on behalf of LBI,
20 pursuant to Rule 15c3 of the Securities Exchange Act of 1934 or
21 otherwise". See that?

22 A. Um-hmm.

23 Q. Now, what that did -- that language did was say Lehman
24 cash is excluded from the deal, except for the Lehman cash in
25 the customer protection account, right?

1 A. Well, it did say that that would have provided that if
2 there were cash in the 3-3 account, it would have been a
3 purchased asset and not an excluded asset, yes.

4 Q. So this is an exception to the exclusion? And the effect
5 of it is to put Lehman cash into the deal?

6 A. Well, I wouldn't say it's to put it into the deal. I
7 would say it is to clarify the operation of the provisions
8 relating to the assets used in the business that are purchased
9 assets and those that were intended to be excluded.

10 Q. And then it goes on to say "are, by or on behalf of any
11 clearing agency or clearing organization, to collateralize,
12 guaranty, secure, whether as margin, guaranty fund deposit, or
13 in any other form, the obligations of Lehman", and it goes on.

14 A. Right. And the purpose of this was to conform the
15 understanding to the understanding of the parties as
16 manifested, for example, in the OCC transfer and assignment and
17 assumption agreement. That margin -- there's no particular --
18 no pre-known allocation of margin between cash and noncash
19 property. People try to usually maintain it in the form of
20 property for economic efficiency.

21 So in terms of what's part of the deal or not, if the
22 margin is part of the deal, there's not -- there's no reason to
23 want to carve out of the margin margin that might happen to be
24 in the form of cash or might be -- might result from the
25 proceeds of positions that are in the account.

1 Q. Now, you --

2 A. So --

3 Q. -- testified earlier, sir, I believe, that the parties
4 were very focused on margin from the very beginning. You
5 recall saying that to Mr. Boies?

6 A. Yes.

7 Q. But through the entire week, nobody had suggested this
8 language before? This was the first time that Cleary Gottlieb
9 suggested this language --

10 A. This --

11 Q. -- isn't that right?

12 A. This was an acquisition of one of the largest and most
13 complicated assets and liabilities, one of the largest and
14 complicated financial businesses in the United States, or even
15 the world, that was done under extraordinarily exigent
16 circumstances in an agreement that was uncharacteristically
17 short, because if there had been an effort made to fully
18 document this agreement as lawyers do when they have the
19 fullness of time and many months in preparation, there were
20 bound to be ambiguities, provisions that might be read in
21 conflict. And the purpose of this, consistent with the intent
22 of selling the business, was to resolve those ambiguities which
23 came to the attention of the parties, which I think this does.

24 Q. And this effort was the first time -- notwithstanding your
25 testimony that the parties were focused on margin from the very

1 beginning, this was the first time that this language was
2 proposed?

3 A. You may be correct. I think the record will reveal
4 whether or not that's true. This, I believe, is the first
5 draft that I was familiar with that --

6 Q. And this --

7 A. -- that included this language by --

8 Q. -- this 9 p.m. draft is within a few hours of your
9 receiving that 3:52 p.m. e-mail from the OCC --

10 A. Hang on a second.

11 Q. -- saying that a major issue was how to get the
12 billion dollars in Lehman cash to Barclays, correct, sir?

13 A. I believe that the drafting of this language was done much
14 earlier in the afternoon, and I think this was disseminated
15 much later. There were a number of other provisions. And I
16 don't know when I saw Jim McDaniel's e-mail for the first time.

17 Q. I won't hold you to a specific time, but we can agree that
18 as of Saturday, certainly Saturday afternoon, you were aware of
19 a substantial amount of cash that Lehman had in the customer
20 protection account, right?

21 A. By Saturday afternoon, I'm not sure that I personally was
22 aware of --

23 Q. Certainly by 9 p.m., Cleary Gottlieb was aware?

24 A. Yes.

25 Q. And by 9 p.m., Cleary Gottlieb was aware that there was a

1 substantial amount of Lehman cash at the OCC?

2 A. I think that's true. That's fair.

3 Q. And the purpose of this carve-out is to make sure that the
4 15c3 cash and the OCC cash is clearly carved out of the cash
5 exclusion, right?

6 A. To clarify that, it was not excluded by the excluded
7 assets provisions, correct, consistent with the sale order
8 provisions that the OCC had requested and that the trustee and
9 Weil had agreed to, and consistent with the transfer and
10 assumption agreement. This merely was a documentation of what
11 was consistent with everything that we were both doing and
12 observing the counterparts in the transaction agreeing to. No
13 one at any point had ever suggested that this was not
14 consistent with the understanding of the parties negotiating
15 the transaction. It may be the first time that anybody
16 surfaced language to clarify it, but it would have been a shock
17 to me, based on what I had seen, for anybody to say 'Oh, you're
18 adding something new.' This was fully consistent with
19 everything that I had observed and what the parties had done to
20 date.

21 Q. Well, now, we'll get to the deleting of this language and
22 we'll get to the parenthetical that you later provided and
23 appears in the final clarification letter. But that final
24 language you testified about on direct, "property held to
25 secure" --

1 A. Yes.

2 Q. -- I believe you told Mr. Boies that this language did not
3 have the same degree of specificity as that language that ended
4 up in the final. Do you recall giving Mr. Boies that
5 testimony?

6 A. I think specificity was one aspect of it.

7 Q. Let me stop you just on that one aspect, because that's
8 the only one I want to ask you about. In fact, this language
9 is very specific, is it not?

10 A. It is.

11 Q. This language specifically refers to cash, does it not?

12 A. It's specific in certain regards and it's not specific in
13 others.

14 Q. Well, let's just --

15 A. It is not specific in that it is not specifically
16 referenced to exchange-traded derivatives, whereas the other
17 language is very specifically focused on security that is
18 pledged to secure obligations in respect of exchange-traded
19 derivatives. So there's this -- there are elements of this --
20 it's obviously much more of an alliteration than the more
21 concise formulation, but there are respects in which they
22 differ.

23 Q. Well, let's take a couple of those elements. You'll agree
24 that this is more specific inasmuch as it refers to cash, cash
25 equivalents, bank deposits or similar cash items, right?

1 A. Yes.

2 Q. You will agree that this is more specific in the sense
3 that it has an explicit reference to margin, right? The word
4 "margin" --

5 A. Margin guarantee --

6 Q. -- appears here?

7 A. -- for the deposit, yes. Well, "explicit" -- again, I
8 think you could argue about how clear different words are. I
9 would say that this is more in the style of an enumeration than
10 language which is intended to be more general.

11 Q. This enumeration covers all of Lehman's cash margins, does
12 it not?

13 A. Well, first of all, it wouldn't just be cash. And as I
14 said, it goes beyond -- this would also pick up securities
15 margin, nonexchanged traded derivatives margin, if it were at,
16 for example, DTCC. If there were assets carried in a DTCC
17 participant account for a customer that's margined, that could
18 be included in this. So this was a very broad --

19 Q. No, no --

20 A. -- provision, and it carried a lot of water.

21 Q. My question is just as to the cash margin. This captures
22 all the cash margin, right?

23 A. As did the other provision.

24 Q. And it also captures all of the customer account cash,
25 right?

1 A. Yes.

2 Q. Were you aware whether Lehman had any other cash?

3 A. I was -- I didn't have personal knowledge of what other,
4 you know, bank accounts or sources of cash they might have.

5 Q. This carve-out, in fact, captured all of the Lehman cash
6 of which you were aware, isn't that right?

7 A. No, it captured all of the cash that was in a form that we
8 believed, based on the structure of the deal and the conduct of
9 the parties and the understandings that they manifested, should
10 be a part -- should be clarified as part of the purchased
11 assets.

12 Q. Let me put it to you differently. You were not aware of
13 any cash that Lehman had that was not captured by your carve-
14 out?

15 A. I don't know whether there was cash that was not captured
16 or not, Counsel.

17 Q. You're not aware whether, with this carve-out, the
18 exclusion for cash actually excluded any cash?

19 A. This would not have excluded a bank account at a regular
20 bank that had a balance of a billion, five billion or one
21 billion or half a billion. I had no idea whether or not there
22 were such accounts or not. But this was not directed to such
23 accounts. This was specifically directed to property that was
24 used to secure obligations that, as a result of the purchase
25 agreement, Barclays was going to become responsible for or that

1 were associated with positions that were going to be
2 transferred to Barclays. That's what this language was
3 intended to --

4 Q. Now --

5 A. -- address.

6 Q. -- if Lehman didn't have any other cash other than what's
7 in here, it would be much simpler, would it not, as a drafting
8 matter, simply to say all Lehman cash goes to Barclays?

9 A. As I said, we did not look at this provision from the
10 perspective of what portion of the universe of cash that Lehman
11 did or didn't have would be captured. This language was
12 addressed to specific issues that we thought needed to be
13 clarified in order to effectuate the purposes of the purchase
14 agreement.

15 Q. But you'll agree with me, as a general drafting matter,
16 it's much easier to say all of Lehman's cash is going to
17 Barclays, than to say all of Lehman's cash is excluded except
18 for these two particular varieties of cash, which happen to be
19 all of Lehman's cash?

20 A. I'm not sure the purpose of the hypothetical you're
21 presenting to me. If you're asking whether it's easier to use
22 fewer words than more words, that can be true.

23 Q. In any event, you did not make any inquiries, I take it,
24 or learn that in fact Lehman did not have any other cash? That
25 fact --

1 A. This --

2 Q. -- never came to your attention?

3 A. This was not a hunt for Lehman cash in any way, shape or
4 form. This was directed specifically to the issues that arose
5 over the weekend and that needed attention: DTCC, the 3-3
6 account and mar -- and basically credit support for margin.

7 That's what this was focused on, not where Lehman had the cash.

8 Q. Now, whether you were hunting or not hunting, it did not
9 come to your attention that Lehman had no other cash?

10 A. I had no idea whether they did or did not have other cash.

11 Q. Now, your counsel asked you about some highlighting in the
12 binder that he provided you, and I believe it is in tab 11.

13 And that's Barclays Exhibit 270. And I believe Mr. Boies read
14 to you --

15 A. I'm sorry --

16 Q. It's in the --

17 A. -- where? What tab?

18 Q. It's in the first binder that you have --

19 A. Oh, my --

20 Q. -- that Barclays gave you.

21 A. From the direct?

22 A. Yeah.

23 Q. I think this is the only time I'm going to refer to it, so
24 I apologize for the confusion.

25 A. No problem.

1 Q. But if you could turn to tab 11. And you recall Mr. Boies
2 asked you about this cover e-mail which referred to, and I
3 quote, "Attached please find the most recent version of the
4 so-called clarification letter. The portions highlighted in
5 yellow concern the points which depend on the resolution of
6 current discussions." You see that?

7 A. Yes.

8 Q. Have you seen a color copy of this?

9 A. I don't have a color copy. If I look at the draft, I
10 might be able to tell you. But if you have a draft that's
11 color-copied, I --

12 Q. Do you know whether in fact the section on purchased
13 assets and excluded assets, specifically this carve-out in
14 Section D, was or was not highlighted?

15 A. Yes, it was, and the highlighting included the provision
16 which was the subject of current discussions. There were two:
17 there was the DTCC and 3-3. There were no current discussions
18 outside the context of the clarification agreement, that I was
19 aware of, relating to margin in relation to exchange-traded
20 derivatives. The only two open issues at that time, my
21 recollection is, that are covered by this language in the
22 clarification letter were 3-3 and the DTCC account. That's my
23 recollection.

24 Q. Okay, if you turn to page 3 -- let's see, the -- page 2 of
25 the draft that's attached to this e-mail. And you'll see

1 Section D there is the excluded assets that includes your
2 carve-out.

3 A. Yeah.

4 Q. And that does not show any highlighting.

5 A. On this draft there's no highlighting --

6 Q. Yeah. Have --

7 A. -- anywhere.

8 Q. Have you seen a copy that includes the color that shows
9 the highlighting?

10 A. I'm not sure whether I have.

11 Q. But do you know whether or not that section, including
12 your carve-out, was highlighted for further discussion?

13 A. In the draft that was transmitted, I don't -- am I an
14 addressee on this distribution? I don't believe I am. I don't
15 know.

16 Q. So you --

17 A. But it might have -- but it may very -- but it may have
18 been. What's the question?

19 Q. Question is do you know one way or the other? Was it
20 highlighted for further discussion or not?

21 A. I'm not -- I can't say for certain. There may -- I may
22 have seen in the papers a draft of this, not attached to an
23 e-mail, in which in paragraph D there was some highlighted
24 language. And it may have been around the excluded-assets
25 provision.

1 Q. Okay.

2 A. But my memory is not sharper than that.

3 Q. I don't need to test your memory. I have the production;
4 I have the highlighting.

5 A. Okay.

6 Q. I could show it to you if necessary.

7 A. Please.

8 Q. The only question is to establish --

9 A. Please.

10 Q. -- that you don't know.

11 A. No. I personally.

12 THE COURT: Mr. Maguire, would this be a convenient
13 time for an afternoon break?

14 MR. MAGUIRE: Yes, Your Honor.

15 THE COURT: Let's take a break till 4:00.

16 (Recess from 3:49 p.m. until 4:06 p.m.)

17 THE COURT: Be seated, please. Mr. Maguire, please
18 proceed.

19 MR. MAGUIRE: Yes, Your Honor.

20 RESUME CROSS-EXAMINATION

21 BY MR. MAGUIRE:

22 Q. Now, before the break, sir, we were talking about how
23 certain language was highlighted for further discussion. Do
24 you recall that?

25 A. I recall our discussing it.

1 Q. And there were a number of other matters that were going
2 on over that weekend; the most serious was the JPMorgan issue,
3 right?

4 A. JPMorgan was one of the issues.

5 Q. And you were very involved in that, were you not?

6 A. I was involved. I wouldn't say necessarily very involved,
7 but I was involved.

8 Q. And that took up a significant portion of the weekend, did
9 it not?

10 A. It did. It took many hours.

11 Q. Now, ultimately there was a discussion on the subject of
12 Lehman cash, and that is the hallway conversation that you
13 testified earlier, and that happened in the early hours of
14 Monday morning, isn't that correct?

15 A. I can't remember where that conversation was, whether it
16 was on the far side or the near side of midnight or how late at
17 night it was.

18 Q. And I understand that you may not have heard everything
19 that Harvey Miller said in the course of the hallway
20 conversation, but nobody in your presence said that Harvey
21 Miller was wrong or that in fact there had not been a very
22 clear representation made to the Court that no Lehman cash was
23 going to Barclays?

24 A. I don't remember a conversation along those lines.

25 Q. You do recall that the issue in that hallway conversation

1 was Lehman cash?

2 A. There was a conversation about Lehman cash. There were
3 questions about what was said and what it meant. But I was not
4 there, as I said, for the entire conversation, and I didn't
5 hear what you had described in terms of the discussion.

6 Q. You did understand, however, that Harvey Miller and Weil
7 Gotshal did have an objection to Lehman cash going to Barclays?

8 A. I believe -- well, it may have been an objection. Whether
9 it was an objection or a concern or a question, I couldn't
10 provide more specificity about.

11 Q. Now, in the course of those hallway conversations, you did
12 not say anything to anyone about this other variety of Lehman
13 cash that you were aware of, the Lehman margin cash?

14 A. The subject didn't come up.

15 Q. And you did not raise it?

16 A. I was not leading the discu -- I was only tangentially
17 involved in the part of the conversation about the cash. I was
18 not there for the entire conversation.

19 Q. You were asked a lot of questions on direct about what
20 people didn't tell you about Lehman's margin. Do you recall
21 that?

22 A. Um-hum.

23 Q. At no point during the hallway conversations did you raise
24 an issue that Lehman cash was at the OCC and that in your
25 understanding it was supposed to go to Barclays?

1 A. Well, not during that conversation. But I had forwarded
2 an e-mail to the trustee on precisely the subject of a billion
3 dollars in cash. Nobody was trying to hide anything about the
4 cash or avoid the issue. The trustee signed an agreement that
5 provided that all of the margin was going over to the Barclays
6 accounts, and it would have included cash.

7 Q. You understand I'm talking to you now about the hallway
8 conversation?

9 A. Yes, I understand that, but you're -- but the question
10 that you're asking me is whether or not a discussion about a
11 3-3 should have automatically set off an alarm about the
12 discussion about margin, and margin and the 3-3 accounts have
13 similarities and differences.

14 Q. My only question, sir, was what you said. And I'm going
15 to try to ask questions --

16 A. Well, I didn't say --

17 Q. -- but --

18 A. I was not a participant in the discussion that preceded
19 the resolution of the 769 million dollars in securities.

20 Q. I'm going to try to ask questions that can be answered
21 with a yes or no.

22 A. Okay.

23 Q. And if you need to add an explanation, I'd very much
24 appreciate, if you could try --

25 A. Okay.

1 Q. -- to answer yes or no and then give your explanation.

2 Okay? Is that fair?

3 A. That's fine.

4 Q. The trustee was not present for the hallway conversation,
5 isn't that right?

6 A. I don't know.

7 Q. At the hallway conversation, you were the only person who
8 was present who was an expert on derivatives, isn't that right?

9 A. I don't know the answer to that question.

10 Q. You were not aware of any other person who was there who
11 was an expert on derivatives?

12 A. I didn't know most of the other lawyers who were involved
13 in the transaction, because I was not for the most part engaged
14 in the negotiation of the documents with the other side. I was
15 dealing, for the most part, with issues relating to DTCC and
16 OCC and JPMorgan, which were not the transaction with the
17 participants. So I did not have a familiarity with all of
18 the --

19 Q. And you didn't --

20 A. -- other lawyers who were involved. Whether they had
21 someone who had expertise in that area or not was not known to
22 me.

23 Q. You do not know whether any of those other lawyers was an
24 expert in derivatives?

25 A. No.

1 Q. You did not know whether any of those other lawyers was
2 aware that the billion dollars in cash at the OCC was all
3 Lehman proprietary cash and not customer cash, isn't that
4 right?

5 A. I didn't know what their state of knowledge was, no.

6 Q. And you did not raise that issue?

7 A. It -- no, I would not have raised that issue.

8 Q. Now, sir, you -- after the hallway conversation, you went
9 back with your colleagues to the conference room that Barclays
10 had at Weil's conference center, and the undertaking was that
11 Weil Gotshal was going to get you a draft, right?

12 A. I'm sorry, this is --

13 Q. This is after the hallway conversation.

14 A. After the hallway conversation, I believe that Weil was
15 handling the draft.

16 Q. And that draft you got is the 4:36 a.m. draft in tab 2 of
17 your binder, Movants' Trial Exhibit 447.

18 A. I'm sorry. Tab --

19 Q. Tab 2.

20 A. Back to your binder?

21 Q. Yes. Now, if you turn, sir, to page 2 of the draft,
22 you'll see we have the excluded assets down at the bottom, that
23 last full paragraph. And Weil Gotshal had deleted your carve-
24 out, isn't that right?

25 A. It had deleted a large portion of one of the clauses, yes.

1 Q. You were asked some questions on direct about the subject
2 of whether anyone objected to your language. In fact, Weil
3 Gotshal deleted most of your carve-out, isn't that right?

4 A. No, the question that was asked of me was did anybody
5 object to this language in relation to the handling of margin,
6 and the answer was no.

7 Q. Well --

8 A. This, as we discussed earlier, relates to the 3-3 account,
9 DTC and a margin.

10 Q. The first part, sir, relates to c3, right? This part --

11 A. Yes, the very first part.

12 Q. -- relates to c3?

13 A. Yes.

14 Q. The next part, sir, relates to margin held by or on behalf
15 of any clearing agency or clearing organization to
16 collateralize, secure -- guaranty, secure, whether as margin,
17 guaranty fund deposit or any other form. That's not c3, sir,
18 right? That's all margin?

19 A. No. The first part is c3, but the part that you just
20 described -- margin is one of the elements but not necessarily
21 limited to margin in respect of exchange-traded derivatives is
22 the point I'm trying to --

23 Q. And Weil Gotshal deleted the whole reference --

24 A. Deleted --

25 Q. -- to margin?

1 A. They deleted the entire provision, which included language
2 which would simultaneously have applied to the clearinghouse
3 that was OCC and the clearinghouse that was DTCC, because the
4 clearing participant carries property for the account of
5 customers. It has obligations and is required to settle
6 transactions by those customers, and it would have the ability
7 to use property of customers to settle those obligations. So
8 it would have included more than just OCC.

9 Q. Now, when you got this draft deleting most of your carve-
10 out, and specifically the part that concerned Lehman's margin,
11 the cash, you decided you would propose new language, isn't
12 that right?

13 A. Yes.

14 Q. And you did that because you were concerned that there was
15 a prospect of a dispute between Lehman and Barclays on the
16 subject of Lehman's cash margin, isn't that right?

17 A. I deleted it because I thought that the language that was
18 deleted was overinclusive and that we needed to fill the gap
19 that was created by the overinclusive deletion.

20 Q. If you could give me a yes or no answer and then explain
21 as much as you wish, sir. You were concerned about a dispute
22 between Lehman and Barclays about the deletion, Weil's
23 deletion, of your carve-out?

24 A. No. I was concerned with completing the process of
25 documenting the understanding of the parties. I was not

1 focused on disputes. I was focused on clarification.

2 Q. You were concerned, were you not, sir, that Weil's
3 deletion of your carve-out would lead to negative inferences
4 against Barclays?

5 A. I was of the view that the deletion of that language would
6 not -- would have resulted in a clarification language that did
7 not treat customer margin in a manner that was consistent with
8 the deal and which we were trying to clarify in these
9 provisions.

10 Q. And you were specifically concerned about negative
11 inferences that could arise from Weil's deletion of your carve-
12 out, isn't that correct?

13 A. Yes. Yeah, I think that's a fair way of characterizing
14 it.

15 Q. Specifically, in the context of dispute, in light of the
16 deletion of that language?

17 A. Yes. If there would have been a dispute, what was in and
18 what was not in the clarification agreement would bear on it.
19 And so we wanted language that reflected the agreement of the
20 parties.

21 Q. You and your Barclays colleagues were concerned about what
22 might have been the subject of a dispute in light of Weil's
23 deletion of that language --

24 A. I was not --

25 Q. -- isn't that correct?

1 A. -- in any way focused at that point on a dispute. I was
2 focused on conforming the language of the clarification
3 agreement to the terms of the agreement, which is the purpose
4 of the entire document. That's why it's called the
5 clarification agreement or letter.

6 Q. Do you deny, sir, that you were concerned about what might
7 have been the subject of a dispute in light of Weil's deletion
8 of that language?

9 A. I was -- no, I was concerned -- that is certainly -- yes,
10 in the sense that that is certainly a potential consequence.
11 My focus, however, on the language was in attempting to make
12 sure that we had documented and clarified the deal terms in the
13 clarification letter as to those matters that might be
14 ambiguous under the asset purchase agreement.

15 Q. I'm going to ask you a little more about your concern.
16 That concern that you had was a collective concern, by you and
17 your Barclays colleagues. Isn't that right?

18 A. If you're asking me whether I discussed -- I'm not sure of
19 the answer to your question. If you're asking me whether I
20 discussed that concern with Barclays colleagues, the answer is
21 no.

22 Q. Certainly you and your Cleary Gottlieb colleagues
23 collectively were concerned about the kind of negative
24 inferences that would arise from Weil's deletion of this
25 language?

1 A. It would have been -- not -- you are right that failing to
2 clarify it could have left a gap in the terms of the deal and
3 the terms as represented this that could be exploited in a
4 litigation to argue different terms. So yes, I was focused on
5 clarifying. There was no discussion about am I concerned? Are
6 you concerned? Is he concerned? We were focused on reflecting
7 exactly what we thought were the terms of the deal, consistent
8 with the documents that the trustee had executed and we had
9 indicated that we were going to execute.

10 Q. And you were concerned that in a litigation over Lehman's
11 cash, negative inferences would be drawn against Barclays
12 because Weil had deleted this language. Isn't that right, sir?

13 A. Well, it was -- no. In fact, it was not just about cash.
14 What I came to be concerned about, to the extent that I was
15 concerned about anything, was to make it clear -- because this
16 was, as I said, an exception to an exception. It referred
17 primarily to cash and cash equivalents, and I wanted to make
18 sure that all of the forms of credit support that guaranteed
19 obligations under exchange-traded derivatives were covered,
20 whether or not they fell into that litany of cash or cash
21 equivalents.

22 In some cases, clearinghouses have obligations that are --
23 that are secured by the requirement that the clearing
24 participant own stock and pledge the stock. There are a
25 variety of structures. What I realized when I saw the deletion

1 was that we needed language to make it abundantly clear that
2 all of the credit support that was available for exchange-
3 traded derivatives was covered. And yes, that does include
4 cash.

5 And to the extent that we hadn't clarified it, there could
6 have been an argument. And clarifying it alleviated any
7 dispute as to whether or not it was the intent of the parties
8 to include credit support for exchange-traded derivatives in
9 whatever form.

10 Q. So you were concerned about a litigation between Lehman
11 and Barclays on the subject of Lehman's margin?

12 A. Mr. Maguire, I was not even contemplating the prospect of
13 a litigation --

14 Q. Well, you were --

15 A. -- at that time.

16 Q. -- specifically concerned about negative inferences that
17 would arise in that litigation. Isn't that right?

18 A. I was concerned about accomplishing what every lawyer
19 involved in a transaction endeavors to accomplish, which is to
20 ensure that the language in the agreement as clearly as
21 possible, as unambiguously as possible, accurately documents
22 the terms of the deal. That's what I was involved in trying to
23 accomplish.

24 Q. Do you deny that you and your colleagues were concerned
25 about the sort of negative inferences that could arise?

1 A. I deny that we discussed any such concern at the time.

2 Q. Do you deny that you were concerned about such negative
3 inferences?

4 A. I'm -- I was concerned about addressing shortfalls in the
5 language that didn't reflect the deal which, yes, any
6 discrepancy between the terms of an agreement and the terms of
7 a deal, could give rise to a dispute. Yes. And my job was to
8 make sure that I as accurately as I was able to do, reflected
9 the terms of the transaction. And so, yes, I added language, I
10 proposed language to Lehman, to reflect what I perceived to be
11 the gap in the terms in the deal and provided it.

12 Q. So when you say "yes" you were concerned about negative
13 inferences. Is that correct? One more yes would cover this.

14 A. Yes, with a caveat about what the word "concerned" means.
15 If you'll beg me that indulgence.

16 Q. By all means.

17 A. Thank you.

18 Q. You did not go talk to Harvey Miller about the deletion of
19 the language with respect to margin?

20 A. No.

21 Q. You did not go talk to anybody at Weil?

22 A. It never occurred to me that it would be an issue putting
23 contention. Everything that I had seen, everything that the
24 trustee had done, every portion of the transaction transpiring
25 from just before the sale hearing until that moment in time,

1 was entirely consistent with the notion that all of the credit
2 support that secures exchange-traded derivatives was to be
3 transferred to Barclays. There was no event that occurred that
4 put me on notice in any way that there was any question about
5 that until well after the settlement of the -- well after the
6 transaction, when the trustee began to articulate different
7 positions on the subject of a margin.

8 Q. And --

9 A. But certainly at this time, I had no reason to suspect --
10 no reason to suspect -- that what I was doing was in any way
11 controversial. So we provided the language to Lehman, and
12 consistent with my expectation, Lehman accepted the language,
13 put it into the document, and the parties executed the
14 documents.

15 Q. Your understanding at the time, you say, is that Barclays
16 was entitled to all of Lehman's cash, cash equivalents, bank
17 deposits or similar cash items that were held at a clearing
18 agency as margin, a guaranteed deposit or any other form?

19 A. To --

20 Q. You thought that reflected the business deal, isn't that
21 right?

22 A. Yes. But you summarized some of the language, counselor,
23 but not all of the language. Because it was "and for which
24 purchaser shall become responsible as of the closing, pursuant
25 to the requirements of such clearing organization." We -- this

1 was -- this language was only directed to those cash or cash
2 equivalents that were, in essence, committed to support an
3 obligation. They are very different than cash.

4 If you have cash in a bank account -- if you have any
5 question about the difference between a bank deposit and the
6 cash that's committed to secure obligations, go to the clearing
7 organization and ask them to give it to you back. There's a
8 fundamental difference between the two, and that's what we were
9 trying to get at here.

10 Q. One way to deal with negative inferences would be to go
11 back to Weil and say look, we understand the business deal is
12 that Barclays is getting all of the margin. Isn't that right?

13 A. That's exactly what I did. I put it in black and white in
14 a rider that is as clear as I was able to articulate it at that
15 time and under the circumstances. And I did give it to them.

16 Q. You --

17 A. And if they didn't agree with it, or if there were any
18 questions about it, they would have said we're not accepting
19 this language or we wanted to change the language in the
20 following way. There was no -- nobody suggested that that
21 language that we provided did not accurately reflect the
22 understanding of the agreement.

23 Q. And no way did you see Weil's deletion of a large part of
24 your carve-out here, to in any way suggest that there was any
25 doubt or objection on the part of Weil?

1 A. No, because the deletion immediately followed the
2 resolution of two of the principal issues that are addressed in
3 that language. That's why.

4 Q. It immediately followed the hallway conversation
5 concerning Lehman cash. Is that right?

6 A. No. The distribution of that may have. But the drafting
7 of that language occurred well before the conversation in the
8 hallway, I believe.

9 Q. So following --

10 A. Again, if I have the -- if I have the timing right. I
11 don't want to suggest that I accurately know exactly what
12 happened at each hour, because much of it is a blur in terms of
13 the sequencing of events.

14 Q. -- so notwithstanding Weil's deletion of much of your
15 carve-out, you felt it was still absolutely clear that Barclays
16 was entitled to all of Lehman's margin?

17 A. I didn't think that the deletion reflected any question
18 about that particular issue. But that happens frequently in
19 negotiations.

20 Q. And you didn't call in any of the Weil people to discuss
21 that or talk to them about that?

22 A. At that time, I didn't think there was any reason to. I
23 gave them the language that reflected my views about what they
24 had done. I did, so I communicated my view of what they had
25 done. And if your question is, did they ever communicate back

1 to me any reaction that suggested that that wasn't the deal;
2 no, they never did.

3 Q. And what you sent back to them instead was a new
4 parenthetical that you described on your direct?

5 A. Yes.

6 Q. And you sent that back to Weil because you wanted to avoid
7 becoming embroiled in extensive negotiations. Isn't that
8 right?

9 A. Over words, yes. I didn't want to get involved in a
10 protracted negotiation of words. And as a result, I formulated
11 what I thought would be the most clear and concise and brief
12 formulation of the concept that I was trying to convey, and put
13 it in the documents. Because for every time you add a clause
14 or a word, you're inviting something -- you're inviting a
15 dispute or an argument or a negotiation. And we were very
16 early in the morning at that point in time. And so I wanted to
17 just make sure that if there was any issue, it wasn't about
18 wording, it was about substance. Because that provision is as
19 clear a definition of margin and guarantee fund deposits as I
20 was able to draft under the circumstances and at the time. I
21 thought it was abundantly clear.

22 Q. So you did not send them back the part of this carve-out
23 that deals with margin?

24 A. No, because it was intertwined -- that language that deals
25 with margin deals with other things as well. And one of the

1 things that I've learned in the course of negotiation is
2 sometimes it is best not to go back and hit your head against
3 the same wall. There are very frequently problems that you
4 encounter because you don't realize how the other party is
5 reacting to words that you intend in a particular way. And
6 it's better to go down -- it is better to approach the
7 resolution of the issue by just being clear about what the
8 issue is instead of trying to survive a fight of pride of
9 authorship as to whether your language wins or their language
10 wins. So this was about substance and avoiding wordsmithing.

11 Q. So --

12 A. It wasn't about avoiding issues.

13 Q. -- you still sent them your language. You just --

14 A. I --

15 Q. -- didn't send them the language you had proposed and
16 which they had deleted. You sent them new language that you
17 crafted yourself, personally. Isn't that right?

18 A. Yes.

19 Q. And that's the parenthetical?

20 A. That's the parenthetical, yes.

21 Q. And by sending them the parenthetical, you believed you
22 would avoid becoming embroiled in extensive negotiations on the
23 subject of Lehman's margin. Isn't that right?

24 A. Certainly over the words of it. If there was an issue
25 about the substance of it, we would have negotiated. I had no

1 expectation that that would happen. But I certainly felt that
2 I had done what I could to avoid arguing over words and
3 formulations.

4 Q. Now, if you turn, sir, to tab 6 of your binder -- I'm
5 sorry, tab 7 -- you'll see a draft at 6 a.m., sent by your
6 partner, Michael Mazzuchi. Do you see that?

7 A. Yes, I see that.

8 Q. And that went to Isaac Montal at DTCC and you were copied
9 on it. Do you see that?

10 A. Yes.

11 Q. And this 6:03 a.m. draft, that does not include the
12 parenthetical. Isn't that right? If you'd turn to page 2 at
13 the very top -- page 2 of the draft, sorry.

14 A. Yes, this draft does not include that language.

15 Q. It says -- under item (c) it says, "Purchased assets are:
16 (c) exchange-traded derivatives and collateralized short-term
17 agreements." No parenthetical, right? So you had not
18 submitted it as of 6 a.m.?

19 A. I'm not sure that I hadn't submitted it before 6 a.m.

20 Q. It's certainly not in the 6 a.m. draft that your partner
21 circulated?

22 A. It's not in here.

23 Q. And the draft that your partner circulated, accepts all of
24 the Weil changes. Isn't that right? You'll see your carve-out
25 is now gone from excluded assets.

1 A. He didn't -- we -- I'm sorry, but the circumstances were
2 this -- were these, I'm sorry. It was 6 o'clock in the
3 morning. We were trying to finalize the DTCC agreement. The
4 DTC had -- in connection with the finalization of the
5 agreement, their counsel had asked us to give them the current
6 version of the clarification letter. We did not control that
7 document. We did not control its contents.

8 What happened was, we asked for the current draft from
9 Weil. Weil provided it to Mike Mazzuchi who immediately sent
10 it on to the other side. We did not review it. We did not
11 evaluate it. Where -- you know, where this was in relation to
12 their processing of the riders I can't say. But this was
13 merely a transmittal from us to the DTCC to reflect the current
14 status of the clarification agreement.

15 Q. And to the trustee, right? You sent this to the trustee
16 as well?

17 A. It may very well have gone to the trustee.

18 Q. And in this version that you sent to -- that your partner
19 sent out at 6 a.m., the Weil deletion of the carve-out -- does
20 this reflect --

21 A. If this is the --

22 Q. -- Weil's deletion --

23 A. -- yes.

24 Q. -- correct?

25 A. If this is the draft, it doesn't reflect it.

1 Q. Nonetheless, you were still working on new language.

2 Isn't that right?

3 A. I'm candidly not sure I remember exactly what the sequence
4 and timing was, when it was showed to me -- when the language
5 that came back deleting the (1)(d) provisions or (1)(c)
6 provisions, whatever they were, and then when it was that I
7 drafted the language and exactly when it went back to Weil. I
8 just don't remember exactly what time it was in that continuum
9 from Sunday night to Monday morning.

10 Q. After you received the 4:36 a.m. draft from Weil, the one
11 that deleted your carve-out, you reviewed that carefully, did
12 you not?

13 A. I reviewed it quickly, but yes, as carefully as I could.

14 Q. You noted earlier that Weil had not actually deleted all
15 of your carve-out -- most of it yes, but not all of it. And
16 one of the things that Weil left in is in this draft in (c), at
17 the bottom of the page, the first ten lines, going down four
18 lines, the sentence that begins, "Except as otherwise specified
19 in the definition of purchased assets."

20 A. Um-hum.

21 Q. You had added that language, right?

22 A. As I said, I did not personally add that language, but --

23 Q. That was in the Weil edition -- the Cleary Gottlieb --

24 A. It may have been.

25 Q. -- edition?

1 A. I'm not denying it. I'm just -- I didn't draft it.

2 Q. Okay. Now, what that language means, of course, is that
3 anything that is specified as a purchased asset is
4 automatically carved out of excluded assets, right?

5 A. I think the purpose of that was to specify that unless, in
6 the clarification letter, something was identified as a
7 purchased asset, it was to resolve a conflict between excluded
8 assets and purchased assets.

9 Q. That's right. So if you were to -- if anyone was to
10 identify Lehman margin as a purchased asset, then it would
11 automatically be carved out --

12 A. Yes.

13 Q. -- of the definitions of excluded assets?

14 A. That's the way that provision would have operated as
15 drafted, correct.

16 Q. And so you drafted a parenthetical that would make
17 Lehman's margin a purchased asset?

18 A. The credit -- the property pledged -- held to support the
19 exchange-traded derivatives would have been a purchased asset.

20 Q. And by making it a purchased asset, it was automatically
21 carved out of the definition of excluded assets?

22 A. Yes. Although if it had been kept in there, it would have
23 also been carved out from the definition of excluded assets.

24 So I'm not entirely sure what the significance of the
25 distinction is. But yes. But it seemed to us, you know, why

1 do it as an exception to an exception? Why don't we just put
2 it directly in the definition of purchased assets together with
3 the exchange-traded derivatives?

4 Q. And thereby you accomplished exactly what you had been
5 trying to do with the original language that had been in the
6 Cleary Gottlieb 9 p.m. draft from Saturday?

7 A. Yeah. Although as I say, there are some differences, but
8 yes.

9 Q. You submitted a declaration on this subject, did you not,
10 sir?

11 A. I believe -- well --

12 Q. If you'd turn to tab 3 of the binder?

13 A. 10 of your binder?

14 Q. I'm sorry, tab 3.

15 A. Oh, I'm sorry.

16 Q. On the second page of that draft, you'll see paragraph 5.

17 A. Um-hum.

18 Q. And you say, "The draft language at issue was an attempt
19 to accurately document the business deal that had already been
20 negotiated and agreed, by clarifying, inter alia, that Barclays
21 would acquire the margin, including cash associated with the
22 exchange-traded derivatives positions carried by LBI." Do you
23 see that?

24 A. Yes, I do, sir.

25 Q. Okay. Now, if you'd turn to the end of that paragraph on

1 page 3, you'll see the last sentence says, "Because excluded
2 assets is defined as assets 'except as otherwise specified in
3 the definition of purchased assets', clarification letter
4 (1)(c), the inclusion of margin in whatever form, for exchange-
5 traded derivatives, in the definition of purchased assets,
6 necessarily means that such margin is not encompassed within
7 the definition of excluded assets in section (1)(c) of the
8 clarification letter" --

9 A. Yes.

10 Q. -- "which is consistent with the discussions of the
11 lawyers from both sides." Do you see that?

12 A. Right.

13 Q. Now, in fact, sir, you have no knowledge of any such
14 discussions. Isn't that right?

15 A. Well, I have knowledge of the discussions in the sense
16 that they manifested themselves in an agreement that was signed
17 by the participants in the discussions.

18 Q. You're referring here to nothing other than what you
19 believe would have happened in the course of the parties
20 agreeing to sign the APA?

21 A. I was -- as I say, I was not part of the negotiation, so I
22 can't testify as to those negotiations. But what I am saying
23 here is that this is consistent with the APA and the original
24 sale order. And I think it's pretty clear that the OCC read
25 the language and reached the same conclusion.

1 Q. So you're not aware of any discussions. You're just
2 inferring that such discussions, in your belief, would have
3 happened?

4 A. I'm -- as I infer from snow on the ground when I wake up
5 in the morning that it snowed overnight, I'm inferring that if
6 the parties reached agreements on terms specifying the scope of
7 the agreement, that they must have had discussions leading up
8 to the memorialization of those agreements. But yes, that's
9 all that I mean by that.

10 Q. Now, your parenthetical, I believe, is in the final
11 clarification letter. And that's Exhibit 3, which I believe
12 you'll find in tab 8 of your binder. And that's on page 2 of
13 the exhibit. And at the top of the page, you'll see those are
14 the words that Mr. Boies quoted earlier, "And any property that
15 may be held to secure obligations under such derivatives."

16 A. Yes.

17 Q. You wrote that language by hand into the agreement, right?

18 A. I believe that I -- somebody handed me a copy of the
19 agreement. I took the page which the predecessor language was
20 on and I wrote in handwriting that language, and that, I
21 believe, one of my partners handed it back to the Weil lawyers
22 in the clarification negotiation room who were running the
23 documents. Yes.

24 Q. It was very important to you that this parenthetical
25 include Lehman's cash. Isn't that right?

1 A. It was important to me that the -- to the extent that any
2 of Barclays' obligations that they were going to assume by
3 assuming the accounts in which the exchange-traded derivatives,
4 that whether or not the property that secured the obligations
5 was in the form of cash or not cash, would be included.

6 Q. So that was a matter of critical importance, multibillion
7 dollar importance, that this include Lehman's cash. Isn't that
8 right?

9 A. It turns out that that's --

10 Q. In fact, in your declaration, if you'd turn back to tab 3,
11 again, that same paragraph we were looking at, paragraph 5,
12 you'll see at the bottom of page 2, you quote the language and
13 you insert in square brackets -- after "any and all property,"
14 you insert in square brackets, "including cash," right?

15 A. I'm just trying to get my references to -- is this a
16 discussion of the final provision or the antecedent provision.
17 Yes -- yeah, this is the predecessor position --

18 Q. Right.

19 A. -- to the -- yes.

20 Q. Now, in the parenthetical that you provided to Weil, you
21 didn't include those words "including cash"?

22 A. No.

23 Q. You made no -- you didn't use the word "cash"?

24 A. No.

25 Q. You didn't use the word "cash equivalent"?

1 A. No. I said "any property", which I think fairly clearly
2 encompasses any property, which would include all of those
3 things. So I didn't think I was necessary.

4 Q. And you gave the sheet of paper with your handwriting to
5 your partner who went to somebody at Weil and pointed out the
6 handwriting, the change that needed to be made, right?

7 A. I'm assuming that's what happened.

8 Q. And other than that there was -- you were not aware of any
9 discussion of what, if anything, was said to Weil, other than
10 pointing out that new language?

11 A. No. But I had no reason to suspect that it would be
12 controversial, because I had no reason to suspect that if the
13 concept was agreed, that support for exchange-traded
14 derivatives would be an asset that was to be transferred to
15 Barclays, it was a matter of -- it could be a matter of totally
16 random events, how the composition of that margin was as
17 between different forms of credit support. And there was
18 nothing in the documents that suggested to me, or the
19 conversations of the parties, that anybody was focused on
20 carving out a distinction in the case of margin, between cash
21 and non-cash margin.

22 So there was no conversation, because there was -- I was
23 not operating under any impression that there needed to be --
24 that that was a subject of potential dispute.

25 Q. And you don't know who the person at Weil was to whom your

1 partner gave the handwritten change?

2 A. I don't know.

3 Q. You don't know --

4 A. I don't --

5 Q. -- obviously, if that person was an expert in derivatives?

6 A. I have no idea whether or not he was. I am certain that a
7 firm as sophisticated as Lehman, hiring lawyers as
8 sophisticated as they have, find the requisite expertise.

9 Q. You don't know whether that person had any awareness
10 whether the property at the OCC was Lehman proprietary property
11 as opposed --

12 A. Well --

13 Q. -- to customer property?

14 A. -- nobody had better access to that information than their
15 client.

16 Q. You had no knowledge as to what was in the mind of that
17 person at Weil who received your handwritten change?

18 A. I would have no reason to know what was in their mind,
19 what they asked for or what --

20 Q. And you have no --

21 A. -- they were --

22 Q. -- idea whether they thought this handwriting change was
23 simply conforming an item with the transfer of customer
24 property?

25 A. I can't speculate as to what was in their minds when they

1 received it. I assumed that the per -- that any lawyer that
2 received that would understand what it means.

3 Q. You did not circulate any e-mail or PDF or any electronic
4 or paper circular to anybody with your --

5 A. No newspaper adverts --

6 Q. -- handwritten changes?

7 A. -- no.

8 Q. Nobody got a red-line? There was no further draft?

9 A. We didn't control the documents, Mr. Maguire. We were not
10 in a position to have done that, even if we had wanted to. The
11 Weil Gotshal lawyers were not able to connect us up to the
12 printers. And as a result, Weil Gotshal consistently -- or
13 Simpson Thacher, I'm not sure which actually -- but the lawyers
14 representing the Lehman side controlled the documents. We had
15 no way to put language in a document.

16 Q. In your testimony on direct, it sounded as though this
17 parenthetical appeared in the next draft. I may have misheard,
18 but it sounded as though there was a suggestion --

19 A. If there was -- if --

20 Q. Maybe I should finish --

21 A. -- that's --

22 Q. -- my question.

23 A. -- no, no. If -- that's not accurate, and candidly, this
24 is the first time I'm seeing the draft that went out to the DTC
25 party in response to their request that it didn't include that

1 language. And I assume that that was just a matter of time.

2 Q. The question I have is --

3 A. We never rejected --

4 Q. -- there wasn't a next draft? Your handwritten
5 parenthetical went into what was then the execution version of
6 the clarification letter. There was no intermediate draft.
7 Isn't that right?

8 A. I think that -- I think that's right. It was suggested to
9 us that it was acceptable to the other side.

10 Q. Now, this parenthetical, it was intended to pick up all of
11 Lehman's cash margin, as you say, right?

12 A. All of the credit support that Lehman would have provided
13 to secure obligations under their -- forgive me, but there's --
14 there are subtle differences, and I want to make sure that
15 we're clear about what I felt it encompassed.

16 Q. You had -- you understood that this would be a very
17 significant amount of value that this parenthetical covered?

18 A. Yes. Yes. Which is one of the reasons why it was
19 important to document the terms of the transaction correctly.

20 Q. Lehman had a very significant amount of customer property
21 to margin?

22 A. I'm sorry?

23 Q. Lehman had a very significant amount of customer property?

24 A. I -- these provisions applied to futures positions, listed
25 options positions, on a multiplicity of exchanges and cleared

1 through different clearing organizations. The only information
2 that I saw glimpses of which -- and we can talk about this --
3 provided a relatively incomplete picture, was OCC. I did not
4 know what the entire picture was.

5 Q. You did have an understanding that customer margins --

6 A. I --

7 Q. -- in the billions of dollars, Is that correct?

8 A. -- I understood -- yes. I understood that there was very
9 significant positions that Barclays was assuming responsibility
10 for. And I wanted to make sure that Barclays was obtaining all
11 of the credit support for the obligations that it was assuming
12 and that it was entitled to under the APA, yes.

13 Q. And you understood that Lehman's proprietary margin was in
14 the billions of dollars?

15 A. I had the information that was circulated by OCC. But I
16 would have assumed Lehman Brothers, being as significant as it
17 was, that there would be large amounts, and that those amounts
18 corresponded to the risks that were associated with the
19 positions that they were guaranteeing. And therefore, large
20 amounts, necessarily meant very large risks.

21 Q. Sir, if you could turn to tab 9, which is the APA, the
22 asset purchase agreement. And if you could turn -- that's
23 Movant's Trial Exhibit 1. And if you could turn to page 4 of
24 the contract -- actually page 3 -- you'll see that starting at
25 the bottom of page 2, and then for the next two pages, are

1 definitions of excluded assets. Do you see that?

2 A. Yes.

3 Q. And if you turn to clause (n) on page 4, you'll see at the
4 very top of that page, one of the excluded assets, right?

5 A. Um-hum.

6 Q. And that is one that excludes all assets primarily related
7 to the IMD business and derivatives contracts. Do you see
8 that?

9 A. Yes.

10 Q. And you were aware, of course, that in this deal, the IMD
11 business was excluded from the sale?

12 A. I'm -- that's my understanding.

13 Q. And the investment management division, that was a
14 division that catered -- providing investment services to
15 wealthy clients for their stocks and bonds and --

16 A. Yes.

17 Q. -- mutual bonds?

18 A. We may have covered this before, but there was a portion
19 of an investment management business that was transferred.
20 Whether structurally it was part of the IMD business, I have no
21 idea. But there was a part of the business that was -- there
22 were customer accounts that were managed accounts that ended up
23 coming across to Barclays.

24 Q. But --

25 A. But subject to that, yes.

1 Q. -- the IMD piece --

2 A. Yes.

3 Q. -- and those clients and their stocks and bonds, that was
4 excluded from the deal --

5 A. Um-hum.

6 Q. -- and all assets related to the IMD business were
7 excluded from the deal, right?

8 A. Right.

9 Q. And this exclusion also excludes all assets primarily
10 related to derivatives contracts. Isn't that right?

11 A. Well, I suppose it depends upon how you parse it. It says
12 "all assets primarily related the IMD business and derivatives
13 contracts." So whether or not the "all assets primarily
14 related to" applies to both the IMD business and derivatives is
15 not clear. But I agree that that's an issue for construction
16 in that provision.

17 Q. And you will agree, sir, will you not, that margin is an
18 asset that is primarily related to derivatives contracts?

19 A. Well, exchange-traded derivatives and OTC derivatives, for
20 each of them, it is. But I, in the totality of the agreement,
21 don't read that reference to derivatives to contemplate
22 exchange-traded derivatives. I read that reference to
23 derivatives to be a reference to non-exchange-traded
24 derivatives -- over-the-counter derivatives.

25 Q. You agree, however, that margin is an asset that is

1 primarily related to derivatives contracts?

2 A. Yes.

3 Q. And you agree that exchange-traded derivatives are
4 derivatives contracts?

5 A. They are a subset of derivatives contracts.

6 Q. And Lehman's exchange-traded derivative at the OCC, they
7 were all derivatives contracts?

8 A. They were exchange-traded derivatives contracts.

9 Q. And Lehman's margin at the OCC, and other exchanges --

10 A. Um-hum.

11 Q. -- was primarily related to those derivative contracts.
12 Isn't that right?

13 A. Yes. But as I say, the distinction is between over-the-
14 counter derivatives and exchange-traded derivatives. No -- if
15 anybody felt that that reference meant that the margin for
16 exchange-traded derivatives did not go to Barclays, that would
17 have rendered bizarre the sale order provisions that OCC
18 requested and obtained, the transfer assignment and assumption
19 agreement that everybody signed.

20 The reading that you're suggesting here -- I understand
21 why you're suggesting it -- but it is just manifestly
22 inconsistent with the conduct of the parties under their plain,
23 collective interpretation of the provisions.

24 Q. Just the facts, sir. Lehman's margin at the OCC was
25 primarily related to the exchange-traded derivatives --

1 A. Yes.

2 Q. -- at the OCC?

3 A. Correct.

4 Q. Right?

5 A. Yes.

6 Q. And same for exchange-traded derivatives at all other
7 clearings --

8 A. Yes.

9 Q. -- clearinghouses? In fact, you told us earlier on
10 direct, did you not, that you can't have an exchange-traded
11 derivative without margin. And so the two -- one is
12 necessarily primarily --

13 A. Yes.

14 Q. -- related to the other?

15 A. Yes.

16 Q. Right. Now, I understand your position is that this
17 reference to derivatives contracts should be understood to
18 refer only to over-the-counter derivatives contracts, right?

19 A. Yes. I believe that was the intent of the drafters.

20 Q. But those words "over-the-counter" --

21 A. Are not there.

22 Q. -- derivatives do not appear in this exclusion?

23 A. I cannot argue with you about that. They are not there.

24 Q. You never made that insertion, nobody else ever made that
25 insertion, and you didn't tell anyone at Weil that they should

1 make hat insertion, right?

2 A. No. This was -- this was done before I ever saw it.

3 Q. And you never suggested to anyone at Lehman or at Weil
4 Gotshal that your understanding or that Barclays' understanding
5 was that the words "derivatives contracts" here should be
6 understood to mean only over-the-counter derivatives contracts,
7 and specifically not to include or to refer to exchange-traded
8 derivatives?

9 A. At what time?

10 Q. At any time.

11 A. Well, I wasn't aware of this language until after we
12 closed the transaction.

13 Q. Sir, I'd now like to turn -- oh, I'm sorry. One minor
14 point. That is -- yeah. With respect to your communications
15 with the OCC, specifically on the subject of the transfer and
16 assumption agreement -- you remember giving some testimony on
17 that, subject? If you turn to tab 11 of your binder, you'll
18 see Barclays' Exhibit 229. And that's an e-mail to you from
19 Alex Rivera, who was a lawyer for the OCC. And he was at the
20 Saturday sale hearing and he e-mailed you from that hearing.

21 Do you see that?

22 A. Yes.

23 Q. And he wanted you to sign or get signed the account
24 changeover and transfer and assumption agreement?

25 A. Right.

1 Q. And in fact, the OCC repeatedly over the weekend, followed
2 up to try to get that agreement signed. Isn't that right?

3 A. Yes.

4 Q. And if you turn to tab 13, you'll see an e-mail that you
5 sent to the OCC on Sunday morning at 3 -- Sunday afternoon at
6 3:31 p.m. Do you see that? And you apologize there, saying,
7 "Very sorry to keep you hanging and appreciate your and Bill's
8 cooperation."

9 A. Yeah.

10 Q. And so as of Sunday afternoon, Barclays had still not
11 signed the transfer and assumption agreement. And you were
12 leaving the OCC still hanging, right?

13 A. I wasn't leaving the -- I was leaving them hanging in the
14 sense of not finalizing the documentation which was not going
15 to be finalized in any event, except in connection with the
16 closing of the entire transaction. It was also not an issue
17 from a documentation perspective, that we thought that was
18 controversial.

19 We had provided them with our comments. But I was trying
20 to deal with issues that were requiring active negotiation and
21 resolution in order for the deal to close. And my perception
22 of the situation with the transfer and assumption agreement was
23 that it was not, at the end of the day, when we turned our
24 attention to it, going to present an obstacle to signing the
25 closing. So -- and I think I may have explained in a

1 conversation to Jim McDaniel that we were focusing on some
2 rather difficult issues at the time.

3 Q. And you told us on direct that even when they made the
4 ultimate threat to liquidate everything, you still weren't able
5 to get them a signed agreement?

6 A. No, but we got them -- we communicated to them that there
7 were a lot of issues that needed to be resolved, and they
8 should hang tight. And they agreed that they were going to
9 hang tight, but that they were going to poise themselves to act
10 very quickly, because if things were not resolved to their
11 satisfaction, they were going to act to eliminate all of the
12 risk that you're suggesting Barclays should have assumed
13 without the benefit of all the credit support that the OCC had
14 control over.

15 Q. And ultimately, you did get them the signed agreement, and
16 that was -- that's in tab 14, where your partner has -- that's
17 Barclays' Exhibit 286. And that's where your partner, Michael
18 Mazzuchi sends them the executed agreement, in connection with
19 the closing call which was -- which he says is starting now.
20 Do you see that?

21 A. Are you pointing me to his e-mail -- his --

22 Q. Yes, his e-mail. It's at the very front of that Exhibit
23 286 in tab 14.

24 A. Yes, I see this e-mail.

25 Q. And that's at 7:51 a.m., almost 8:00 in the morning. And

1 that's when they got the signed agreement?

2 A. Yes.

3 Q. Now, until then, there were a number of brush fires that
4 you had to deal with, right?

5 A. I and others, yes.

6 Q. And in the course of doing that work -- well, let me ask
7 you, please, to turn to the first page of the agreement, the
8 transfer and assumption agreement.

9 A. Can you please remind me what tab?

10 Q. Same tab, tab 14. Actually, you can turn to page 2.

11 A. Um-hum.

12 Q. And if you look at Section 2, it's "Representations and
13 Warranties," and look at subsection (c). You'll see that,

14 "Barclays hereby represents: 1)" -- "Barclays hereby:

15 (i)represents and warrants that it has received such documents
16 and information as it has deemed appropriate to make its own
17 credit analysis and decision to enter into this agreement." Do
18 you see that?

19 A. Um-hmm.

20 Q. And you were aware that the OCC had provided statements to
21 Barclays over the weekend, right?

22 A. I was aware of the statement that -- the projected pays
23 and collects. I believe that they did get some information.

24 I'm not -- I'm not certain precisely what was covered by the
25 information that they provided, how comprehensive it was. But

1 I do understand that they were in touch, trying to get
2 information about the accounts.

3 Q. So you're aware that Barclays got information concerning
4 what was at the OCC?

5 A. Um-hmm.

6 Q. You personally were not involved in performing that credit
7 analysis that Barclays undertook?

8 A. Yeah. Or reviewing the documents that they were
9 reviewing.

10 Q. Now, of course, the sale transaction did ultimately close.
11 And that billion dollars of cash that you had corresponded with
12 the OCC about, that entire one billion dollars of Lehman cash,
13 that all transferred -- the entire amount of it -- to Barclays,
14 isn't that right?

15 A. I'm assuming it did.

16 Q. And if you turn, sir, to tab 12, you'll see an additional
17 e-mail that you received from the OCC on Sunday at 11:05 a.m.
18 Do you see that?

19 A. Yes.

20 Q. And you'll see at the bottom of that, are the projected
21 settlements for the former Lehman Brothers Inc. OCC accounts.
22 Do you see that?

23 A. Um-hmm.

24 Q. These collect, i.e., pay from OCC to the clearing member
25 include -- and there's a list of payments that the OCC projects

1 it will make, right?

2 A. That's correct.

3 Q. And you understood that these were all movements of cash,
4 right?

5 A. Yes.

6 Q. The second one is a firm movement of cash. That's 300-
7 and-almost-60 million dollars that the OCC is going to pay on
8 Monday morning, right?

9 A. Correct.

10 Q. And if you go down second from the bottom, you'll see
11 another firm one for just over nine million?

12 A. Correct.

13 Q. So you understood that these were movements of cash that
14 the OCC was going to make to Barclays Monday morning?

15 A. I understood these to be projected settlements based on
16 what the OCC knew Sunday at whatever time this was generated.
17 So if nothing in the world changed, and these were accurate
18 computations, I would have expected them to be an amount like
19 this.

20 Q. And you understood that the payments of cash to Barclays
21 would be in the hundreds of millions of dollars?

22 A. If they were made in these amounts, they would be in these
23 amounts.

24 Q. And if you see, down at the bottom of this page, they
25 actually specifically say, "These settlement projections are

1 assuming all margin collateral posted by Lehman Brothers Inc.,
2 continues to be part of the account on a going-forward basis,
3 or has been replaced with good collateral of equal value."

4 A. Right.

5 Q. And --

6 A. I'm sorry.

7 Q. -- the point of that, you understood, was that as far as
8 the OCC was concerned, they didn't care whether margin came
9 from Lehman or from Barclays, they just wanted margin. Isn't
10 that right?

11 A. They did want the level of margin. But they had provided
12 for that level of margin to come from Barclays. And if the
13 margin had been there and had been from Lehman and this had not
14 been resolved, because Lehman was in liquidation, they may very
15 well have just liquidated the accounts anyway, even if they had
16 gotten the money, if those accounts were Lehman. What they
17 cared about was that the credit on the accounts was Barclays'.
18 And one of the reasons why they refer specifically to cash --
19 to collateral of equal value, is that usually excess cash is
20 replaced with fixed income securities of a high credit value.
21 So they're not requiring that it remain in cash. But to the
22 extent it wasn't -- it didn't remain in cash, they wanted
23 somebody to substitute securities of equivalent value.

24 Q. OCC wanted to be protected by collateral?

25 A. That's exactly what they were looking for.

1 Q. As to whose collateral, that was a matter that was not of
2 primary concern to them?

3 A. Well, they would want to make sure that the collateral
4 they got was unencumbered. That's, for example, why they
5 wanted the language in the sale order. Because if they had
6 gotten the transfer into the accounts, but had been subject to
7 an encumbrance, that would not have been acceptable to them.
8 So some of the details of the circumstances under which they
9 come into possession is important.

10 Q. Let's not get into the details. But let's close with one
11 question. If -- your understanding, if Barclays had decided to
12 wire four billion dollars to the OCC, the OCC would not have
13 had any objection to that?

14 A. As -- no. They would welcome all infusions.

15 Q. Now, sir, I'd like you to turn your attention to the
16 subject of the communications with the Depository Trust
17 Clearing Corporation. You understand that DTCC was a
18 clearinghouse?

19 A. Yes.

20 Q. It was very concerned about its exposure to Lehman, right?

21 A. Yes.

22 Q. It had been offered 250 million during the week as a
23 limited guarantee, and it had rejected that as being
24 insufficient. Isn't that right?

25 A. Earlier in the week. I just have to say, I came into the

1 negotiations when the solution involving the residential
2 mortgages and the 250 million were underway. But my
3 recollection is that initially, 250 million was not acceptable
4 to them.

5 Q. And following that, there was an agreement to go forward
6 with additional protection, which was the billions of dollars
7 of residential --

8 A. Residential mortgages.

9 Q. -- mortgage securities?

10 A. There was a portion of the residential mortgages that was
11 to be allocated as a limited recourse.

12 Q. And then they were no longer available?

13 A. And they were not longer available.

14 Q. And the parties were back to square one, right?

15 A. Yes.

16 Q. Now, you understood that the person who was in charge of
17 dealing with DTCC was Gerard LaRocca?

18 A. I wouldn't say that Gerard was in charge of dealing with
19 them. There was a deal team that was responsible for the
20 business issues. But Gerard LaRocca was very knowledgeable
21 operationally. I think he may even have been on the board of
22 DTCC. So he was an important resource. But I wouldn't have
23 said Gerard LaRocca was responsible for determining the
24 resolution of the DTCC arrangements. But he was certainly a
25 participant.

1 Q. If a top Barclays executive, specifically Rich Ricci,
2 testified to this Court that he personally put Gerard LaRocca
3 in charge of dealings with DTCC --

4 A. Well, I guess the question is, what did he mean by "the
5 dealings with DTCC."

6 Q. I'm sorry?

7 A. The question I have is, what did he mean by "the dealings
8 with DTCC"?

9 Q. Specifically making sure that this deal did not fall apart
10 over a problem with DTCC?

11 A. If he said that --

12 Q. Are you in a position to --

13 A. No, I'm not in a posi -- I'm not in a position to -- I'm
14 not in a position to contradict either what he said or what he
15 believed or what he did. I'm trying to figure out how I can --
16 how I can respond further without raising a potential privilege
17 issue. It was not my -- let me just say that it was not my
18 impression that Gerard LaRocca was the ultimate decision-maker
19 as to how much risk Barclays was or was not willing to accept
20 in connection with the DTC matter. But he was certainly an
21 integral part of the team that was focused on resolving the
22 issue.

23 Q. But you're not in a position to contradict or overrule --

24 A. No, I am --

25 Q. -- Mr. Ricci as to who --

1 A. -- not.

2 Q. -- he put in charge?

3 A. I am not, and I wouldn't pretend to be.

4 Q. Now, sir, you do agree that there were continued
5 discussions between DTCC and Barclays on Sunday night?

6 A. Yes. There were more than one discussion with DTCC that
7 night.

8 Q. And you and your Barclays colleagues participated in these
9 discussions by telephone --

10 A. Yes.

11 Q. -- with DTCC on the --

12 A. Yes, DTC was on --

13 Q. -- other line?

14 A. -- the other end of the telephone. Yes.

15 Q. And you did that from a room at the Weil conference
16 center?

17 A. Yes.

18 Q. And you walked in and out of the room as those calls were
19 going on?

20 A. And other -- there were other -- there were other matters
21 that were being addressed in that room too.

22 Q. And that particular room was a separate room on a floor
23 separate from and below the floor on which all the other
24 meetings were going on, concerning the clarification letter and
25 the deal, right?

1 A. Yes. I think Weil made that room available to us, because
2 all of the other rooms were occupied with other work teams.

3 Q. And you were jockeying between several rooms on the
4 different floors?

5 A. I was jockeying between rooms -- rooms and hallways and
6 conference rooms.

7 Q. You were present for a lot of the calls with DTCC?

8 A. A number of them.

9 Q. But you were not present for all the calls with DTCC?

10 A. I would say that I was not present for every portion of
11 every call. But for the most part, I was there.

12 Q. You were not present for all the calls with DTCC?

13 A. There may have been -- as to whether or not there were
14 calls earlier in the day that I was not a participant in, I
15 can't remember at this point. But I was in a number of calls
16 with DTC that day. It may have been all of them, but I'm not
17 sure that I was in all of them.

18 Q. For the calls for which you were present, the Barclays
19 participants included Gerard LaRocca, right?

20 A. Not all of them, I believe, but I think most of them.

21 Q. Another participant was Jonathan Hughes?

22 A. Yes.

23 Q. Another participant was Archie Cox?

24 A. Yes.

25 Q. And another participant was Michael Klein?

1 A. Yes.

2 Q. You believe it was Archie Cox who told DTCC that Barclays
3 would not provide any guarantee beyond the limited 250 million,
4 right?

5 A. That's my recollection. I believe that's right.

6 Q. But you don't recall the specifics of the Sunday night
7 calls?

8 A. Well, I recall their substance. I don't recall the
9 specifics of the conversations, the specific words of all of
10 the conversations. I remember some of it, and some of it I
11 don't remember as clearly.

12 Q. Well, specifically you don't recall anything else that
13 Archie Cox said in any of the calls?

14 A. His specific words? No. I do recall him conveying -- I
15 don't want to say "saying", because these may not have been the
16 words that he used -- but I clearly remember him conveying that
17 Barclays was not going to assume responsibility for the
18 accounts or provide credit support beyond the 250 million
19 dollar holdback.

20 That was the purpose of the conversations to --

21 Q. You don't recall anything else that he said?

22 A. Not specifically.

23 Q. Now, you don't recall anything that Jonathan Hughes said.

24 A. There was a -- which conversation are we referring to?

25 Q. Sunday night calls with DTCC.

1 A. In Sunday night calls there was toing -- there was a lot
2 of back and forth about the allocation of risk and, largely,
3 about who was in a position to evaluate it, because there was
4 information that Barclays was able to obtain. This is not that
5 different from the OCC situation in the sense that there was a
6 lot of information they could obtain on paper, but they
7 couldn't get a complete picture, and DTC not only had
8 information about the positions they had them loaded on their
9 systems and could model them and evaluate what the risk was.
10 And, so, there was a lot of discussion about, as between the
11 two, who could put themselves in a position to evaluate it in
12 order to resolve the issue. So there was a lot of toing and
13 froing on, sort of, those types of topics.

14 Q. I know the hour is late, but I'm going to ask you to try
15 to adhere to our promise to each other.

16 A. Okay.

17 Q. I will ask you, and you will answer yes or no and then
18 give whatever explanation you need. You don't recall anything
19 that Jonathan Hughes said in the Sunday night calls?

20 A. I don't recall. No, I don't recall, specifically, what he
21 said in those calls.

22 Q. You don't recall anything that Michael Klein said?

23 A. No. I don't recall what Michael Klein said.

24 Q. You do recall that Mr. LaRocca spoke?

25 A. I -- I re -- yes, I recall that he was a participant in

1 the discussions. I don't remember specifically what he said.

2 Q. In fact, there were a lot of conversations about the
3 transfer of securities, right?

4 A. No, I don't recall a lot of conversations about transfers
5 of securities in the context of the final conversations. There
6 were earlier conversations about how transfers would be
7 effected in respect of various customer accounts and the like
8 that -- that may have even been earlier, as the parties were
9 trying to work out what was there and what needed to be
10 transferred as part of the closing of the transaction and where
11 those securities might go to Barclays' accounts and things of
12 that nature.

13 Q. And you weren't particularly focused on --

14 A. The operational issues

15 Q. -- matters that you considered to be operational.

16 A. No, I was not focused on -- although I did -- I was -- I
17 tried to be instrumental in trying to make sure that the
18 meetings got scheduled and that the operational issues were
19 addressed, to the extent that was necessary for Gerard to do
20 whatever and what he was tasked to do by Mr. Ricci.

21 Q. You do recall that there may have been continued
22 discussions on the operations side concerning the transaction?

23 A. I believe there were ongoing conversations. I believe
24 there was an operations team that was looking at issues. I
25 don't know what they were discussing with DTCC or the full

1 range of issues that they were looking at.

2 Q. You were not privy to all of those discussions?

3 A. No.

4 Q. Those discussions involved Mr. LaRocca.

5 A. I don't know whether he was there in all times. There
6 were other people on his operational team, so I think he was
7 there for a large portion of them.

8 Q. All the other people on his operational team reported to
9 him.

10 A. Yes.

11 Q. He was the head operations guy.

12 A. Yes, he was the head of operations.

13 Q. You're aware, sir, that in negotiating the clarification
14 letter that Barclays obtained a right to return clearance box
15 assets that it did not want?

16 A. I've seen that provision.

17 Q. In fact, if we turn to the clarification letter, which is
18 in your binder at tab 8, you'll see at the bottom of page 1
19 there's a reference to Schedule B and the clearance box, and in
20 the last three lines you'll see there's a parenthetical that
21 starts, and this follows. Are you with me, sir?

22 A. I'm sorry. I'm trying to find the paragraph in my draft.

23 Q. Very first page, bottom of the page under purchased assets
24 under Item B --

25 A. Okay. I'm with you.

1 Q. It's talking about the securities and other assets in the
2 clearance boxes, and that Barclays gets that as of the time of
3 closing, and, then, dropping down to the very end, the
4 parenthetical reads "Provided, however, that purchaser, in its
5 discretion, may elect within sixty days after the closing to
6 return any such securities to LBI". Do you see that?

7 A. Yes.

8 Q. And you don't know why that was done?

9 A. I don't have -- I don't have direct knowledge. I could
10 speculate, but I don't have direct knowledge.

11 Q. You were not privy to those discussions?

12 A. No, I was not.

13 Q. On its face you can tell this language indicates that
14 there may be assets in the clearance box that Barclays decided,
15 for whatever reason, it did not want --

16 A. Or it might not -- or it might not want. That there
17 might -- they might not want.

18 Q. But you have no knowledge of what prompted this?

19 A. No, I was not a participant in discussions leading up to
20 it.

21 Q. And if you turn, sir, to tab 16, you'll see Movants' Trial
22 Exhibit 628. And that's an e-mail from your partner, Michael
23 Mazzuchi, to Sheldon Hirshon, copied to you, concerning DTC.

24 You see that?

25 A. Yes.

1 Q. And he says "Shelly, I'm wondering if I could send you a
2 few comments on the DTC docs, understanding that the DTC team
3 is tied up on bigger business issues at the moment". And it
4 continues. Now, you see that, sir?

5 A. Um-hum.

6 Q. And this is attached as a draft of an agreement, and the
7 time of his e-mail is 11:39 p.m. You see that?

8 A. Um-hmm.

9 Q. And if you turn to the next page you'll see the asset
10 purchase agreement is identified in the very first line of the
11 body of the agreement. "We are writing in connection with the
12 asset purchase agreement." You see that?

13 A. Yes.

14 Q. And, then, if you look at the next page you'll see there's
15 a Section 2 that's called excluded assets and liabilities. You
16 see that?

17 A. Um-hmm.

18 Q. And you'll see that in the body there there is
19 highlighted, or in bold, the words "purchased assets". You see
20 that?

21 A. Yes. Sorry.

22 Q. And this refers to how certain of the positions in pending
23 transactions may be excluded from purchased assets. You see
24 that?

25 A. Yes.

1 Q. And, then, down at the end of the paragraph you'll see
2 there's a reference to terms, the term 'known purchased assets'
3 is used. You see that?

4 A. Yes.

5 Q. And, again, you were not involved in any discussions with
6 DTCC concerning about what assets Barclays would designate as
7 excluded assets or non-purchased assets?

8 A. No, I wasn't in, and I didn't review this markup with Mike
9 Mazzuchi, and Mike Mazzuchi was not a participant in the
10 discussions with DTCC. And am I -- am I correct that this is
11 before the e-mail in which he says the deal has changed?

12 Q. I can't give you the chronology. I'm sorry.

13 A. Okay.

14 Q. But the discussions about what Barclays wanted or didn't
15 want, those discussions would have been had by the operations
16 team, right?

17 A. I'm sorry. Could you say that again?

18 Q. The discussions with DTC about what assets Barclays wanted
19 or didn't want, those would have been handled by the operations
20 team.

21 A. I don't think the -- I'm not sure that the operations
22 teams would have discussed that subject with DTCC. The
23 question about what Barclays was and wasn't buying would have
24 been held with Lehman.

25 Q. Mr. LaRocca was the head of the operations team, right?

1 He had a team working for him.

2 A. Yes.

3 Q. He had a due diligence team working for him.

4 A. Yes.

5 Q. He had an extensive team. Isn't that right?

6 A. I don't know how many people were on his team, but I'm
7 sure he had the asset -- the resources that he felt necessary.

8 Q. And you were not privy to all of his discussions with
9 DTCC?

10 A. No, I was not.

11 Q. Now, for the calls on which you were present, the DTCC
12 participants who were on the phone, they included Larry
13 Thompson. Isn't that right?

14 A. Yes, that's correct.

15 Q. And you said he's the general counsel?

16 A. I believe so, yes.

17 Q. Isaac Montal?

18 A. Yes, he was on some of the calls.

19 Q. Do you know his position?

20 A. He's deputy.

21 Q. Shelly Hirshon?

22 A. Yes.

23 Q. He was the --

24 A. Outside --

25 Q. -- outside counsel?

1 A. Yes.

2 Q. And, for at least some of the calls, DTCC's chairman, Don
3 Donahue, right?

4 A. Yes.

5 Q. And after Barclays told DTCC that it was not going to
6 provide more than 250 million dollars Larry Thompson indicated
7 that DTCC would issue a cease to act, right?

8 A. Not for the first time. The -- we understood that if
9 Barclays was not going to assume the accounts and they were not
10 going to operate they were going to have to issue a cease to
11 act so that people -- shouldn't be submitting transactions,
12 because DTCC was no longer going to accept and process new, you
13 know, transactions.

14 Q. DTC had been very consistent. Isn't that right? That if
15 it didn't get what it needed --

16 A. Yes.

17 Q. -- it would have to issue a cease to act notice.

18 A. If -- yes, correct.

19 Q. And you called Shari Leventhal to tell her that the whole
20 deal could fall apart over a problem with DTCC. Isn't that
21 right?

22 A. I told her that I felt that in order for us to get the
23 transaction concluded on the time frame that we were operating
24 under that DTCC would have to evaluate carefully the degree of
25 credit support that it was demanding. The call to Shari

1 Leventhal was more about DTCC's desire to replace the
2 residential mortgages with something on the order of a billion
3 plus in additional credit support than anything else.

4 Q. You thought it would be helpful to let the fed know, and
5 you didn't want the fed finding out at the last minute, that
6 this thing was falling apart --

7 A. Correct.

8 Q. -- because of problems with DTCC.

9 A. Correct.

10 Q. So you called Shari Leventhal to tell her that if you
11 couldn't reach resolution with DTCC you might not be able to
12 close the transaction.

13 A. Correct.

14 Q. And there's no question that DTCC made clear to Barclays
15 that if they did not have adequate protection they would have
16 to issue a cease to act.

17 A. They made it very clear to us that if they didn't reach a
18 satisfactory resolution that they would cease to act.

19 Q. And that was precisely why Barclays continued to negotiate
20 with DTCC --

21 A. But --

22 Q. -- on Sunday night.

23 A. The reason that Barclays continued to negotiate with DTCC
24 is that in order to complete the transaction and to consummate
25 it there were clearance box assets that had to be transferred,

1 there were customer accounts that had to be transferred, and if
2 DTC, to coin a term that was used, shut down the pipes and
3 refused to do that, then the deal would not have been able to
4 be closed and the negotiations were about what DTCC required in
5 order for it to process the transactions that were contemplated
6 by the deal and whatever was already in their pipeline, after
7 which they would proceed to liquidate the Lehman Brothers'
8 accounts. And what they were focused on was what their
9 exposure and liability might be in the course of that
10 liquidation.

11 Q. A couple of quick things I think we can agree on. Until
12 late that Sunday night there was no agreement with DTCC, right?

13 A. I think that's correct.

14 Q. And it's your position that very late Sunday night DTCC
15 indicated that it would go forward with the limited 250
16 million --

17 A. Correct.

18 Q. -- guaranty? And you have no knowledge what prompted
19 DTCC to agree, as you say, to go forward with nothing other
20 than that limited guaranty?

21 A. No, nothing except that they had said all along that they
22 were reviewing what was in the accounts, what transactions were
23 pending and what their risk was, so I assume that as time went
24 on they got a better and better picture of that, even though
25 not a complete picture, but, ultimately, my understanding is

1 that they, whatever conclusion they reached was consistent with
2 what they were able to accomplish, which was to liquidate the
3 accounts without a loss and, in fact, I think, without need for
4 recourse to the 250 million dollars. So I'm assuming that just
5 as Barclays was involved in quite a lot of deliberations on its
6 end, DTCC was involved in quite a lot of deliberations on its
7 side in terms of what its position and its risks were.

8 Q. But that's all assumption on your part. You have no
9 knowledge.

10 A. I have knowledge that they said that they were looking at
11 the risk and that they were evaluating and that they had teams
12 working around the clock to try to do that. I mean, I -- they
13 did communicate that, but did they tell me exactly what their
14 thinking was? No. I was not privy to their internal
15 conversations.

16 Q. If you turn, sir, to tab 17 of your binder, that is
17 Movants' Trial Exhibit 449, and that is the DTC agreement, is
18 it not?

19 A. Yes.

20 Q. It's a letter agreement. It's dated September 22, 2008.
21 It's addressed to the trustee and it's addressed to John
22 Roderfeld, Director of Operations, right? And the first
23 paragraph defines the asset purchase agreement as the agreement
24 that's referred to, then, throughout this letter contract. Do
25 you see that?

1 A. Yes.

2 Q. And, then, if you turn to the second page, sir, you'll see
3 there's a section that begins "Winding down of accounts". Do
4 you see that?

5 A. Yes.

6 Q. Now, you understood that Barclays was getting all of the
7 assets in the DTC clearance boxes, right?

8 A. Yes.

9 Q. And you understood that Barclays was excluding all of the
10 liabilities that were associated with those accounts?

11 A. Yes.

12 Q. So you understood that after the closing Lehman would be
13 left with an empty box that had no assets but all of the
14 liabilities?

15 A. The clearance box that -- no, well, two things. One, I
16 believe that the clearance box assets that were being purchased
17 were described in an exhibit. Whether that was all of the
18 securities that Lehman had I had no reason for knowing. I
19 assumed that it was -- that that was far from the case, that
20 there were lots of transactions and securities but not in the
21 clearance box that would remain free.

22 Q. Everything in the clearance box was going to go to
23 Barclays.

24 A. Yes, that was my understanding.

25 Q. And what was going to be left was an empty box with all of

1 the liabilities.

2 A. Well, what would be the liabilities in the clearance box?

3 There would be -- there would be potential liabilities in

4 processing the transactions associated with the positions and

5 the instructions that were coming in from market participants

6 who had transacted with and through Lehman Brothers.

7 Q. This refers, in the very first sentence, to "Barclays has

8 indicated and hereby agrees that all of the accounts of LBI

9 maintained at the clearing agencies' subsidiaries, the accounts

10 constitute excluded assets within the meaning of the APA".

11 Now, you see that, sir?

12 A. Correct.

13 Q. Now, the APA had a term for purchased assets, did it not?

14 A. Yes.

15 Q. And that term was "purchased assets".

16 A. Correct.

17 Q. It also had a term for excluded liabilities. Isn't that

18 right?

19 A. Correct.

20 Q. And that term was "excluded liabilities".

21 A. Correct.

22 Q. This agreement does not use either of those terms. Isn't

23 that right?

24 A. This agreement does not.

25 Q. This agreement refers to excluded assets, right?

1 A. Correct.

2 Q. You would agree with me that generally an asset is
3 something of positive value?

4 A. Well, it depends on what you mean by positive value.
5 Sometimes it can be an entitlement or a right. The ability to
6 own and control a clearing account is certainly an asset for a
7 clearing broker. Without it the clearing broker couldn't
8 operate. Whether or not it's an asset or a liability will
9 depend upon the facts.

10 Q. Would you generally agree, sir, that a liability is
11 generally something of negative value?

12 A. Yes.

13 Q. And generally the difference between an asset and a
14 liability is a question of whether the underlying item is one
15 of positive or negative value?

16 A. I think I -- I think I answered your question previously.

17 Q. Now, if you turn back to the previous tab, and that is
18 Movants' Exhibit 628, you'll see that in Section 2 there the
19 term 'excluded assets and liabilities' is used. You see that?

20 A. Um-hmm.

21 Q. And that's not the term that's used here in the final
22 agreement. In the final agreement the term that is used is the
23 term 'excluded assets'.

24 A. This is --

25 Q. You see that?

1 A. This is a doc -- this is a completely different agreement
2 that contemplated a completely different arrangement. If you
3 look at part one it says "Barclays will acquire and assume the
4 accounts of LBI". This contemplated a completely different set
5 of arrangements. There is nothing in here that bears on the
6 understandings of the parties with respect to the final, the
7 resolution of the DTCC arrangements. This was based on
8 documentations that assumed that there would be an assumption,
9 which was not the case.

10 Q. And the final agreement does not use the term excluded
11 liabilities. It uses the term excluded assets, correct?

12 A. The final agreement says that the accounts are excluded
13 assets, and simultaneous changes in the clarification agreement
14 clarify that the liabilities associated with the accounts are
15 excluded liabilities. There is no provision saying that the
16 assets in the account -- associated with the accounts are
17 excluded assets. Indeed, quite to the contrary, roughly
18 contemporaneously the provision dealing with the transfer of
19 the clearance box assets was updated to make it clear that it
20 included all of the clearance box assets, whether at DTC or at
21 other clearing houses.

22 Q. And this reference to excluded assets, that refers to,
23 that applies to all of the accounts, right?

24 A. It -- excluded assets -- yes. Excluded assets refers to
25 the accounts.

1 Q. And that includes the clearance box account, right?

2 A. Yes, I believe it would include all of the accounts.

3 Q. And if you go to the next paragraph, sir, in tab 14,
4 Movants' Trial Exhibit 449. This is on page 2. It says "As
5 part of this closeout process the trustee hereby authorizes DTC
6 to accept and act upon instructions from NSCC to deliver
7 securities from the DTC LBI account". You understand that to
8 be a reference to securities from the clearance box account,
9 correct?

10 A. No, I -- I understand this to be a reference to the
11 ongoing authorization of DTC, as this -- these accounts were
12 going to be closed down after the pending transactions were --
13 which was the entire reason, as you pointed out earlier, we
14 were negotiating with DTC to have them process the transactions
15 necessary to consummate the transaction. And what is in the
16 pipeline? As soon as that was done they were going to initiate
17 a liquidation or closeout of the accounts. In order to do
18 that, when transactions come in that require -- or they want to
19 liquidate a position that requires the delivery of a security,
20 DTC is the depository that holds the security, so that if
21 there's a transaction, the sale of a security for cash that's
22 being effectuated by NSCC, this merely authorizes DTCC to
23 deliver to NSCC what it needs in order to perform the
24 transaction when it's closing out the accounts.

25 Q. And it was going to get those securities from an account.

1 A. If it was -- if the security was in a D -- if there was a
2 corresponding security in a DTCC account.

3 Q. And if there was a corresponding security in the clearance
4 box account then DTC would go get that corresponding security
5 from the clearance box account and give it to NSCC, correct?

6 A. If those securities were to be in the clearance box after
7 the consummation of the transaction, which they were not to be.
8 Those -- the clearance box assets would not have been part of
9 the securities that would have been delivered under these
10 arrangements. It would have been all of the other activities,
11 securities and transactions that were worrying DTC and NSCC and
12 GSCC, because they didn't know precisely what the ramifications
13 or the end results of the liquidation process would be.

14 Q. So --

15 A. That's how we under -- let me put it to you this way.
16 This is how we understood this provision to operate.

17 Q. So you understood this provision to allow DTC to deliver
18 securities, go get the corresponding securities from the
19 clearance box account and give it to NSCC only if those
20 securities were in the clearance box account, and you knew that
21 there wouldn't be any in the clearance box account, because at
22 that stage they would all have gone to Barclays.

23 A. I'm sorry. They're -- the -- now, because the securities
24 that would be delivered under these arrangements could have
25 absolutely nothing to do with securities in the clearance box.

1 They could be other assets.

2 Q. I'm talking about the ones that are in the clearance box.

3 A. Yes, if there are --

4 Q. NSCC needs those securities.

5 A. Well --

6 Q. It had the ability here to get them from DTC. Isn't that
7 right?

8 A. If the clearance box assets were to be sold to Barclays
9 then that would have been a null set following the processing
10 of the transaction.

11 Q. If they weren't sold to Barclays, under this agreement
12 there were corresponding securities that NSCC needed, under
13 this agreement --

14 A. Well, this was not an agreement about buying and selling
15 securities. This was an agreement about the responsibility for
16 the accounts. The provisions that deal with what Barclays is
17 and is not buying and selling was in the purchase agreement and
18 the clarification letter.

19 Q. The --

20 A. If you're asking me whether the volume of -- and number of
21 securities that would have been at DTC would be a larger number
22 but for the fact that the agreements contemplated that the
23 clearance box assets would be sold to Barclays, yes, but it
24 doesn't interfere with the operation or meaning of this
25 provision.

1 Q. So you don't read this reference in this sentence "As part
2 of the closeout process the trustee hereby authorizes DTC to
3 accept and act upon instructions from NSCC to deliver
4 securities from the DTC LBI account". You do not read that as
5 in any way relating to the clearance box.

6 A. As -- I do not regard it as being limited to the clearance
7 box --

8 Q. Does it relate to the clearance box?

9 A. It -- it would en -- yes, it would encompass accounts
10 which include the accounts that held clearance box assets.

11 Q. So NSCC could get securities from the clearance box?

12 A. If they were there to be had, they could. If the parties
13 had agreed for them to be sold and for DTCC to transfer those
14 then they wouldn't. And that was the agreement that was
15 reached by the parties, and the understanding was that DTCC was
16 not going to lay claim and deliver out clearance box assets
17 that were being sold to Barclays as part of the clarification
18 letter.

19 Q. Now, the securities in the DTC clearance box were listed
20 on Schedule B to the clarification letter. Isn't that right?

21 A. That's my understanding, yes.

22 Q. And, of course, DTCC could not have given those assets on
23 Schedule B both to NSCC and to Barclays.

24 A. I think that's accurate, yes.

25 Q. DTCC couldn't give the same assets to two different

1 people.

2 A. Right.

3 Q. You never explained or said, told, DTCC that under
4 Barclays' view Barclays' position was that what was going to be
5 left behind was an empty clearance box over which NSCC would
6 have rights to an account with zero content.

7 A. No, I don't think that's accurate. We sent them a draft
8 of the clarification agreement before the DTCC agreement was
9 signed that said specifically that all clearance box assets
10 were being sold to Barclays, so I think they were -- they knew
11 and were told that that was part of the deal and they -- it was
12 never suggested that the deal would be anything else.

13 Q. You're saying there's a matter of documentation.

14 A. Yes.

15 Q. They could have figured it out from the draft --

16 A. That they requested --

17 Q. -- that Mr. Mazzuchi sent --

18 A. That they requested --

19 Q. -- at 6 a.m.

20 A. -- prior to executing the DTCC letter, yes.

21 Q. And that was the 6 a.m. draft?

22 A. I'm -- I'm not sure I remember exactly the time, but it
23 was a very early -- it was the draft very early in the morning,
24 yes.

25 Q. But you never explained to them. You never spoke to DTC

1 and said in a conversation, as opposed to having your partner
2 send a draft of the clarification letter, you never --

3 A. I wasn't --

4 Q. You never told them we're drawing this distinction that
5 you described to Mr. Boies earlier between the assets in the
6 account and the account itself, and that what DTC is going to
7 have at the end of the day is rights to access to an account
8 which we are going to empty.

9 A. No. I never had a conversation that explained to a
10 clearing corporation how its account structure operated, but we
11 had plenty of conversations about how this issue was resolve --
12 was going to be resolved, and those conversations did not
13 include a dependency or a condition on certain assets being
14 sold or not being sold. The final conversation was about the
15 fact that the assets were not, the accounts were not coming to
16 Barclays, contrary to the earlier draft of the agreement that
17 you called my attention to, and that they were going to have
18 250 million dollars in credit support, and there was net -- it
19 was not part of the agreement, and, certainly, DTCC never asked
20 us for any representation or acknowledgement or an agreement to
21 forebear from Lehman selling any of the clearance box assets to
22 Barclays. If they had intended to predicate the arrangement on
23 no assets being sold from outside of those accounts they could
24 have raised that issue and we would have faced it, but it never
25 occurred to them, probably for the same reason it never

1 occurred to us.

2 Q. And --

3 A. Because that's not the basis of the conversations at that
4 time.

5 Q. That did not come up in any of the conversations to which
6 you were privy.

7 A. It didn't come in any of the conversations, and it didn't
8 come up in the summary of the resolution of the DTC call that
9 was made in the large conference room with an open line that
10 was available to all of the members of the creditors' committee
11 and the lawyers who were around and interested to participate
12 in it. Nobody from DTC said that the resolution of this issue
13 is based on Barclays not taking any assets from the Lehman
14 assets.

15 Q. And, sir, can you explain for us why the parties here were
16 providing for the trustee to exercise authority over assets in
17 the Lehman account if your understanding was that those assets
18 contractually --

19 A. Because those accounts needed --

20 Q. -- all belonged to Barclays?

21 A. Not every Lehman account included or was limited to assets
22 that were comprised of clearance box assets. Those are lien
23 free accounts, specifically, and there were a -- there was a
24 significant amount of transaction clearance and settlement that
25 DTCC's various clearing organization subsidiaries would have

1 been responsible and had to process, and to the extent that in
2 order to effectuate a clear transaction there needed to be a
3 security, and that security was in one of those accounts -- was
4 in the DTCC depository, DTCC could deliver out the security
5 that would be used to perform the transaction.

6 Q. The answer that you've just given me to that question is
7 very different from the answer that you gave me at your
8 deposition, is it not?

9 A. You'll have to refresh my recollection.

10 Q. If you'd turn, please, to page 161 of your transcript.

11 THE COURT: While we're doing that, Mr. Maguire, we're
12 about fifteen minutes past our ordinary time for stopping. And
13 the witness has been on the stand for a good part of the day.
14 How much more time do you contemplate for your cross? And I'm
15 going to ask Mr. Boies, if he has redirect, how much time he
16 contemplates, because I'm not going to stay late tonight.

17 MR. MAGUIRE: Your Honor, I could probably finish up
18 in about five or ten minutes.

19 THE COURT: Okay. Mr. Boies?

20 MR. BOIES: Your Honor, I will waive redirect to get
21 the witness home.

22 THE COURT: Fair enough. Let's proceed. Does anybody
23 else have examination for the witness? Any other movants?

24 MS. BLOOMER: No, Your Honor.

25 THE COURT: Okay.

1 Q. Sir, reading at line 12 at page 161 of your deposition
2 transcript.

3 "Q. Can you explain why the parties were providing for the
4 trustee to exercise authority over assets in the Lehman account
5 if those assets contractually were understood all along to
6 belong to Barclays?"

7 And over an objection

8 "A. But I think you're asking me to interpret what the import
9 of this is, because I don't accept your characterization of
10 what this does or what this provision does or says.

11 "Q. So you would answer?

12 "A. I think I would decline to answer on the grounds that I
13 think my interpretation of this provision would be privileged."

14 That was the answer that you gave at your deposition, is
15 it not, sir?

16 A. It is the answer that I gave at my deposition. I think
17 that what I was focusing on was I was there as a fact witness
18 and not to perform the role of interpreting the contract, and,
19 so, I was disinclined to accept your invitation to interpret
20 the provision.

21 Q. Now, you were aware, sir, that the whole point of the
22 negotiations with DTCC was to find a way to protect DTCC.
23 Isn't that right?

24 A. I would say that there were two objectives, as there
25 frequently are in any negotiation. One was to find a way for

1 Barclays and Lehman to consummate the transaction that they had
2 negotiated in a way that would leave DTCC comfortable with the
3 position that it would be in under those arrangements.

4 Q. If your client were to testify that the whole point of the
5 negotiations with DTCC was to find a way to protect DTCC, are
6 you in a position to contradict that testimony?

7 A. I would say it was a very important objective, but it was
8 obviously -- whatever the individual said it was also,
9 obviously, important to do it in a way that would have allowed
10 the transaction to have been consummated. Whether that was an
11 articulated prong it's certainly implicit that the important
12 objective was both to get DTCC comfortable in a manner that was
13 consistent with the consummation of the deal. Would Barclays
14 have done anything to do -- to accomplish that? Obviously not.
15 They were asked to provide a billion plus in additional credit
16 support and they -- and they declined to do that. So there
17 were some limits on what Barclays was willing to do in order to
18 satisfy DTCC.

19 Q. Sir, Weil, Gotshal was not present for your calls with
20 DTCC. Isn't that correct?

21 A. Yeah, the -- my recollection is that they were not in
22 those conversations.

23 Q. I invite you to see the testimony of Harvey Miller on this
24 subject given to this Court on April 28th, the trial transcript
25 at page 88, line 7 through 11.

1 "Q. Does the clarification letter reflect any conscious effort
2 on the part of you or your law firm, to conform that agreement,
3 that draft agreement or that final agreement, with Barclays'
4 separate letter agreement with the DTCC?

5 "A. I don't believe we saw the DTC letter."

6 Now, sir, Weil, Gotshal was not present for the DTC
7 negotiations, right?

8 A. That's correct.

9 Q. So they were relying on Barclays for any conforming of the
10 clarification letter to the DTCC letter. Isn't that --

11 A. Well, I think -- I think they were relying on whoever was
12 participating in the description of the resolution of the DTCC
13 discussions in the larger -- in the larger room.

14 Q. And you have no knowledge of what efforts were made to
15 conform the DTC letter with the clarification letter on the
16 part of Lehman?

17 A. To conform the DTC letter to the clarification?

18 Q. One to the other.

19 A. Yes, there was --

20 Q. Either way.

21 A. There -- yes. There were changes made to the
22 clarification letter that specified that the accounts would be
23 excluded liabilities, and there were provisions, changes to the
24 agreement. I believe the prior draft of the clarification
25 letter had a specific reference to an 074 account. I believe

1 that that was amended and superseded with a provision that
2 referred to, you know, that was not specific to either a single
3 DTC account or, necessarily, DTC.

4 Q. You're referring to changes that were made to the
5 clarification letter, right?

6 A. Yes.

7 Q. You're not suggesting that Harvey Miller or anyone at Weil
8 sat down with the DTCC letter and went through it and made
9 conforming changes to the clarification letter as a result of
10 any conscious effort by them to conform those agreements?

11 A. No, but after a discussion of the arrangement was -- after
12 the lawyers that were assembled and whoever was still on the
13 phone participated in the summary of the resolution of the DTCC
14 issues it was -- people were as open as they could be,
15 consistent with, you know, keeping their nose to the grindstone
16 to get things resolved. So I'm -- it was certainly available
17 at the time at which it had been completed. Nobody had to sign
18 the clarification letter if they were not satisfied with the
19 terms of the DTCC letter. It wasn't as though we could have
20 withheld it from them and made them sign the clarification
21 agreement without having had access to it. Whether they
22 actually asked for it and saw it, as opposed to relying on the
23 description of the resolution, I can't say.

24 Q. You're not in a position to contradict --

25 A. I'm not.

1 Q. -- Mr. Miller's testimony.

2 A. He says he does -- he doesn't believe he saw -- they --
3 they saw the DTCC letter. It sounds like he's not certain, and
4 I certainly don't know what he did or did not know.

5 Q. And you have no knowledge as to what he or Weil, Gotshal
6 knew or did not?

7 A. I do not know what -- I do not know which of the documents
8 at the closing table they picked up and read.

9 Q. Thank you, sir.

10 MR. MAGUIRE: I have no further questions, Your Honor.

11 THE COURT: All right.

12 MR. BOIES: Nothing further, Your Honor.

13 THE COURT: Mr. Gaffey, you're coming forward.

14 MR. GAFFEY: Just in case there's housekeeping, Your
15 Honor. I would say, Your Honor, under the heading of your no-
16 surprises admonition yesterday, it may be a good idea for us to
17 book a little time tomorrow for some housekeeping. I'm told
18 that I have received, while the testimony's been going on this
19 afternoon, designations of twenty-six more witnesses from
20 Barclays, several weeks after I was told I would receive all
21 designations. They include designated testimony from Mr.
22 Diamond, Mr. Hughes and Mr. Ricci, all of whom have testified
23 before, and I would like to spend some time -- not now. I need
24 to think about this overnight, but I think it may be more than
25 a three or four minute housekeeping discussion to determine how

1 we're going to proceed from here on end.

2 THE COURT: Let me ask whether or not you think that a
3 chambers conference is appropriate for this kind of discussion.

4 MR. GAFFEY: Yes, Your Honor, I do.

5 THE COURT: And would you like that to be before the
6 commencement of tomorrow's evidence or just sometime during the
7 day?

8 MR. GAFFEY: It doesn't affect the testimony tomorrow,
9 and if there are witnesses scheduled, just as some point during
10 the day I would like to address it, sooner rather than later,
11 Your Honor.

12 THE COURT: Okay.

13 MR. GAFFEY: It doesn't have to be first thing is the
14 point.

15 THE COURT: Okay. We'll have a chambers conference to
16 discuss the issues that you want to talk about --

17 MR. GAFFEY: Thank you.

18 THE COURT: -- and any other issues you want to talk
19 about --

20 MR. GAFFEY: Thank you.

21 THE COURT: -- sometime tomorrow. We're adjourned
22 till 9:30.

23 (Whereupon these proceedings were concluded at 5:52 p.m.)
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I N D E X

T E S T I M O N Y

WITNESS	EXAM BY	PAGE	LINE
Paul Exall	Mr. Hine	8	14
Paul Exall	Mr. Boies	84	4
Edward Rosen	Mr. Boies	94	9
Edward Rosen	Mr. Maguire	142	9

E X H I B I T S

NO.	DESCRIPTION	ID.	EVID.
M107	deposition notice designating Paul Exall as Barclays' 30(b)(6) witness on bonus and severance payments		11
M801	E-mail thread dated November 2008 beginning with e-mail from James Walker to Paul Exall		38
BCI356	Declaration of Mr. Exall summarizing compensation information related to certain senior executives of Lehman		50

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C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a
true and accurate record of the proceedings.

LISA BAR-LEIB

AAERT Certified Electronic Transcriber (CET**D-486)

Also transcribed by: Clara Rubin (CET**D-491)

Veritext

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Date: August 26, 2010